No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

JOINT APPENDIX

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Petition for Certiorari Filed April 18, 1990
Certiorari Granted October 1, 1990

JOINT APPENDICES

TABLE OF CONTENTS

	PAGE
RELEVANT DOCKET ENTRIES	i
PETITION FOR WARDSHIP	1-2
RESPONDENT'S MOTION TO SUPPRESS EVIDENCE	3-17
PETITIONER'S OPPOSITION TO MOTION TO SUPPRESS EVIDENCE	18-24
HEARING ON THE MOTION TO SUPPRESS	25-93
DENIAL OF THE MOTION TO SUPPRESS	94, 118
THE JURISDICTIONAL HEARING	94-111
THE JUVENILE COURT'S FINDING OF WARDSHIP	110, 120
THE JUVENILE COURT'S DISPOSITION	112-116, 122-124
NOTICE OF APPEAL	125
OPINION OF CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT	126-145
ORDER OF THE SUPREME COURT OF CALIFORNIA, DENYING REVIEW, MARCH 15, 1990	146
ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING CERTIORARI AND LEAVE TO PROCEED IN FORMA PAUPERIS, OCTOBER 1, 1990	147

RELEVANT DOCKET ENTRIES

Date	Docket Entries
April 20, 1988	Petition for Wardship Under California Welfare and Institutions Code section 602 filed in Alameda County Superior (Juvenile) Court, alleging that respondent HODARI, D. possessed cocaine, in violation of California Health and Safety Code section 11350.
May, 2, 1988	RESPONDENT Moves to Suppress Evidence Under California Welfare and Institutions Code section 700.1
May 19, 1988	The Juvenile Court Hears And Denies The Motion to Suppress
May 20, 1988	The Juvenile Court Finds The Allegations in the Wardship Petition to be True
June 6, 1988	The Juvenile Court Continues a Previous Wardship and Orders That Respondent be Placed in a County Facility for a Maximum Period of Five Years and Eight Months.
December 15, 1989	The California Court of Appeal for the First Appellate District Reverses the Judgment of Wardship
March 15, 1990	The California Supreme Court Denies Petitioner's Application for Review

FILED ALAMEDA COUNTY, APRIL 20, 1988
RENE C. DAVIDSON, COUNTY CLERK

OPD #88-44699

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

In the Matter of
HODARI DULAN, a minor
Age 16 Birthdate 6-5-71, CA
Address 2627 65th Ave., Oakland, CA
#632-2579

SUBSEQUENT PETITION Case No. 141401

I, the undersigned petitioner, say on information and belief:

That he is a person described by Section 602 of the Welfare and Institutions Code, in that on or about April 18, 1988, in the County of Alameda, State of California, he did then and there commit a FELONY, to wit: possession narcotics, a violation of Section 11350 of the Health and Safety Code of California, in that said minor did then and there possess a controlled substance, to wit: cocaine;

The names and residence addresses of parents and guardians of said person are:
Father: Albert Dulan, 5797 Foothill Boulevard, Oakland, CA # 569-7345
Mother: Paulette Robinson, 2627 65th Avenue, Oakland, CA # 632-2579

The above named minor is detained in custody. Said minor was taken into custody April 18, 1988 at 10:00 p.m. Hearing as to further detention is set for 1:15 p.m. on April 21, 1988 at 400 Broadway, Oakland, California.

THEREFORE, I request that this minor be adjudged and declared a ward of the court.

JOHN J. MEEHAN, DISTRICT ATTORNEY,
Petitioner

On information and belief, I declare under penalty of perjury that the foregoing is true and correct.
Executed at Oakland, California, on April 20, 1988

/S/
Deputy District Attorney
for Ann Kenfield

The above petitioner is hereby set for pre-trial hearing April 29, 1988, 10:00 a.m., Dept. 25a

SIMMS:skr

SUBSEQUENT PETITION

FILED ALAMEDA COUNTY, MAY 2, 1988
RENE C. DAVIDSON, COUNTY CLERK

JAMES R. JENNER
PUBLIC DEFENDER
400 BROADWAY, 1ST FLOOR ANNEX
OAKLAND, CA 94607
(415) 268-7474

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

In the Matter of,

HODARI DULAN,

A Minor.

Dept. No.: 25

No.: 141401
MOTION AND NOTICE OF MOTION PER §700.1 W&I

TO: THE DISTRICT ATTORNEY OF THE COUNTY OF ALAMEDA AND THIS COURT:

PLEASE TAKE NOTICE that on May 12, 1988, at 8:45 am in Department No. 25 of the above-entitled court, the above-named minor will, and hereby does, move to suppress evidence per §700.1 of the Welfare and Institutions Code. This evidence includes but is not limited to the following indicated items:

All physical (and intangible) evidence seized or obtained as a result of the following deprivations of the minor's liberty and right to privacy, including that resulting from:
__X__ the minor's detention;
____ the search of pat-down or frisk of the minor's person;
____ the minor's arrest;

All physical (and intangible) evidence seized or obtained from a search, entry, and/or opening of the following place(s), including:
____ the residence, building, or structure, entered or invaded by the police in this cause;
____ the box(es), package(s), or other enclosures opened or invaded by the police in this cause;

___ the vehicle(s) entered or invaded by the police in this cause;

This motion is based on violation of the minor's right as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 10, and 13 of the California Constitution. It is based in part on the following particular grounds:

__X__ the police action was without a warrant, and lacked sufficient cause to justify the invasion of liberty complained of;

___ the arrest was in the minor's place of residence without a warrant;

___ the police action violated some or all of the following Penal Code sections: 840, 841, 842, and 1531;

___ the warrant in this cause was insufficient on its face;

___ the affidavit supporting the warrant in this cause was made defective by the omission of material facts or the inclusion of erroneous information;

___ the items seized were outside the scope of the warrant, or the warrant was impermissibly broad;

___ the search was unreasonable or excessive in its scope;

___ the police action was without warrant and relied upon hearsay information from other police sources; the defense therefore requests that said resources be produced in court. People v. Harvey, 156 Cal.App.2d 516. People v. Madden, 2 Cal.3d 1017.

This statement of grounds and evidence is not intended to be exclusive and is based upon such discovery as was available on this date.

DATED: April 29, 1988

Respectfully submitted,
JAMES R. JENNER
PUBLIC DEFENDER

SIGNED BY:
JANICE M. BRICKLEY,
ASSISTANT PUBLIC DEFENDER

FILED ALAMEDA COUNTY, MAY 18, 1988
RENE C. DAVIDSON, COUNTY CLERK

JAMES R. JENNER
PUBLIC DEFENDER
400 PROADWAY, 1ST FLOOR ANNEX
OAKLAND, CA 94607
(415) 268-7474

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

In the Matter of,

HODARI DULAN,

A Minor.

Dept. No.: 25

No.: 141401

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUPPRESS PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 700.1

AN OBJECT DISCARDED UPON AN ILLEGAL DETENTION OR THREAT OF ILLEGAL DETENTION MUST BE SUPPRESSED.

It is well-established in both federal and state law that evidence thrown down or discarded upon an illegal detention or threat of illegal detention must be suppressed. In Reid v. Georgia (1980) 448 U.S. 438, narcotics agents saw Reid at an airport. They approached him and said, "Come with us." He ran, throwing down a bag containing cocaine. The United States Supreme Court ordered it suppressed, eight to one, because the agents did not have enough

information to justify detaining Reid.

In Badillo v. Superior Court (1956) 46 Cal.2d 269, narcotics officers unlawfully entered Badillo's house. Badillo ran out and threw down some heroin. There was no threat to search Badillo's person. However, Justice Traynor in ordering suppression, under the Fourth Amendment, addressed the issue of whether "abandoned" contraband must be suppressed:

> The Attorney General contends that defendant abandoned the evidence when he threw it toward Agent Hipkins and that therefore he may not object to its use against him. It clearly appears, however, that defendant's flight out the front door and attempted disposal of the evidence was the direct result of Officer Getchell's illegal entry, and accordingly, the evidence was obtained in violation of the constitutional guarantees. Silverthorne Lbr. v. United States 251 U.S. 385, 392, et al.

Id. at p. 273.

In Gascon v. Superior Court (1959) 169 Cal.App.2d 356, the officers unlawfully detained and questioned the defendant who was walking out of a liquor store. After questioning him, the officers told the defendant they were going to search him. Rather than allowing himself to be searched and later objecting in court, the defendant ran and threw contraband to the ground. The court suppressed the evidence as the product of an unlawful detention.

In People v. Menifee (1979) 100 Cal.App.3d 235, two San Francisco narcotics officers, walking in a known narcotics area, saw two men walk around a corner. The two men recognized one of the narcotics officers, turned about and walked rapidly away. One of the narcotics officers pursued them, closing the distance from twenty to thirty feet away to one foot behind the two men. At this, one of the two men, Menifee, tossed a pouch of heroin in a trash can.

Justice Racanelli, joined by his colleagues, ruled that the heroin was obtained as the product of a threatened illegal detention and affirmed the trial court in ordering suppression. Although there was no threat that Menifee would be searched, suppression was mandated by Badillo v. Superior Court, supra. (As noted above, there was no threat to search Badillo, either, where Justice Traynor for the Court ordered suppression.) The threatened detention in Menifee was illegal: "Neither presence in an area of high narcotics use nor the deliberate avoidance of police contact--without more --constitute sufficient grounds for a lawful detention." Menifee, 230 (citation omitted).

The most recent California case on this issue is People v. Washington (1987) 192 Cal.App.3d 1120. In

that case the court held that "giving chase after an individual in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention." Id. at 1126 (emphasis added), thus no longer referring to a "threatened detention." The court addresses the question of whether discarding contraband in response to an illegal detention is the "fruit of the poisonous tree."

> In analyzing whether the abandonment breaks the casual connection between the detention and the act of abandonment, courts have examined the facts to determine whether the action was . . . "sufficiently an act of free will." (Taylor v. Alabama (1982) 457 U.S. 687, 690 [73 L.Ed.2d 314, 319, 102 S.Ct. 2664]). . . . Applying these factors to the facts before us, we cannot say the abandonment of contraband by defendant was free of the taint of the illegal detention.
> Two minutes elapsed between the seizure and the abandonment; there were no intervening circumstances. Instead, because defendant discarded the bindles during the chase, the abandonment occurred while he was illegally seized and there could be no intervening circumstances.

Id. at 1126-27. The facts of the present case are identical, except that only one minute elapsed between the unlawful seizure and the abandonment.

Washington and Menifee are in accord with all other states and federal law, where it is "uniformly held" (Fletcher v. Wainwright (5th Cir. 1968) 399 F.2d 62, 64) that tossing evidence down when illegally detained

requires suppression of the evidence.

In United States v. Beck (5th Cir. 1979) 602 F.2d 726, police officers unlawfully ordered a car to stop. The occupants thereupon tossed illegal drugs out the car's window. The Court ordered them suppressed as the result of illegal police activity, relying upon Wong Sun v. United States (1963) 371 U.S. 471.

In United States v. Newman (10th Cir. 1974) 490 F.2d 993, a federal agent stopped a pickup and told the occupants he wanted to look in the back. The pickup drove away and was found abandoned down the road, where it was searched and contraband found. The Court ordered suppression: "Everything was triggered by the original illegal intrusion and the contraband evidence was thus inadmissible as the 'fruit of the poisoned tree.'" Ibid., 995 (Citing Wong Sun v. United States, supra.)

In People v. Shabaz (Mich. 1985) 378 N.W.2d 451, cert. dism. (1986) 106 S.Ct. 3326, officers illegally chased the defendant, whereupon he threw down a paper bag containing a revolver. It was ordered suppressed, relying upon Florida v. Royer (1983) 460 U.S. 491, and Wong Sun v. United States, supra.

> Regardless of whether abandonment was intended, defendant's actions cannot be used to

> dissipate the taint flowing from the unreasonable police conduct. Where, as here, the police activity is coercive in nature, we find that it serves to nullify any abandonment. Shabaz at 462.

In State v. Bennett (R.I., 1981) 430 A.2d 424, detectives investigating a report of narcotics activity at a motel room saw a man, unknown to them, walking through the parking lot. They shouted, "Police, hold it. We want to talk to you." The man tossed down a bag, and it split open, revealing illegal drugs.

It was ordered suppressed as the product of an illegal detention. The Rhode Island Supreme Court noted that in similar situations courts "have uniformly held that the initial illegality tainted the seizure of the evidence," quoting Fletcher v. Wainwright (5th Cir. 1968) 399 F.2d 62;, 64. Bennett, 428.

In People v. Cantor (N.Y. 1975) 324 N.E.2d 872, police illegally detained Cantor, whereupon Cantor displayed a handgun. New York's highest court unanimously ordered it suppressed, reversing the weapon conviction, as the weapon was the fruit of the unlawful seizure of Cantor.

In Commonwealth v. Harris (Pa., 1980) 421 A.2d 199, police unlawfully took a Mr. Foster and others to the police station for a vehicle check. Foster was

allowed to use the bathroom and jettisoned some stolen property in a toilet tank. It was ordered suppressed, as the product of illegal police conduct.

In State v. Dineen (Minn., 1980) 296 N.W.2d 421, an officer was warning Dineen that he was illegally double-parked. The officer saw a coat on the back seat of Dineen's car and told Dineen to move it. Dineen instead jumped out and ran away. The officer picked up the coat, found under it a grocery bag--and in the grocery bag found plastic bags containing illegal drugs. The prosecution argued abandonment. The Minnesota Supreme Court ruled that the abandonment was the product of illegal police activity and affirmed the trial court in suppressing the drugs.

In Commonwealth v. Barnett (Pa., 1979) 398 So.2d 1019, Philadelphia officers were driving along and saw Barnett. He looked at them several times, so they stopped the police car and got out. Barnett ran. The officers ran after him, shouting "Stop." Barnett threw down a pistol and a box of bullets.

The Pennsylvania Supreme Court ruled that the pistol and bullets were obtained at the fruit of illegal police conduct and affirmed the trial court's order of suppression.

In Commonwealth v. Jeffries (Pa., 1973) 311 A.2d 914, Pittsburgh officers saw Jeffries walking. When Jeffries saw the police, he quickened his pace. The police stopped their car and got out and went after Jeffries. He ran. While giving chase, the police saw Jeffries throw down a cigarette package containing heroin.

It was ordered suppressed, as the fruit of illegal police conduct. The Pennsylvania Supreme Court noted that "courts have considered this situation and have uniformly held that the initial illegality tainted the seizure of the evidence," quoting Fletcher v. Wainwright, supra. Jeffries, 918.

In United States v. Foster (D.C., 1983) 566 F.Supp. 1403, a Washington, D.C. officer unlawfully detained a car and its occupants, whereupon one of the occupants, Foster, discarded a sawed-off shotgun at the side of the road. The court ordered suppression.

> An abandonment that is the product of police misconduct is not voluntary and cannot, therefore, vitiate the taint of an illegal detention. Beck, 602 F.2d at 729-30; United States v. Morin, 665 F.2d at 765-770 (5th Cir. 1982); United States v. Gilman, 684 F.2d 616, 620 (9th Cir. 1982). Foster, 1412.

In Commonwealth v. Borges (Mass., 1985) 482

N.E.2d 314, New Bedford officers detained Borges and asked him what was in his pocket. He tried to flee, was grabbed and struggled. During the struggle Borges pulled bags of heroin from his pocket and tried to swallow them. Held: since Borges was illegally seized at the outset, the heroin must be suppressed.

In Settle v. State (Mo.App., 1984) 679 S.W.2d 310, a Kansas City officer unlawfully ordered a car to stop. The driver, Settle, got out and tossed some illegal drugs to the side of the road. Held: the drugs must be suppressed as product of illegal detention. The Missouri Court of Appeals relied upon Wong Sun v. United States (1963) 371 U.S. 471.

In Swicegood v. State (Ala.Cr.App., 1983) 448 So.2d 433, cert. denied by Alabama Supreme Court No. 83-516, a Birmingham officer saw two men near a motel from where a criminal had been arrested some hours earlier. He shouted "Freeze." The two men ran. One of them, Swicegood, tossed a bag in a garbage can. It contained illegal drugs.

Held: the bag of drugs must be suppressed as the product of a threatened illegal detention. The Alabama court relied on Brown v. Texas (1979) 443 U.S. 47, stating it had "no choice but to use the standard

mandated by the United States Supreme Court." Ibid., 435.

In People v. Thomas (Colo., 1983) 660 P.2d 1272, some Denver narcotics officers were driving along in the "Five Points" area of Denver. One of the officers saw and recognized, across the street, in a Church's Fried Chicken parking lot, Joseph "Cherokee" Thomas. The officer said to the other officers, "There's Cherokee." Cherokee Thomas apparently saw the officers and started running toward a building known as the "shack," occasionally used for gambling. The officers piled out and chased him, and as they followed him inside the shack they saw him toss down six balloons of cocaine. Held: the threat of illegal detention required suppression of the six balloons of cocaine.

In State v. Chopin (La., 1979) 372 So.2d 1222, the police saw the defendant walking along the side of the road carrying a paper bag. The police turned on their patrol car lights and blocked his path. He ran, throwing down the bag, which contained illegal drugs. Held: suppression ordered, as evidence was product of illegal detention:

> Where officers do not have the right to make the investigatory stop, property abandoned or otherwise disposed of as a result thereof cannot be legally seized by the police officer. Ibid., 1224.

In the following cases, defendants threw down illegal drugs upon the threat of illegal detention. Held in all: suppression is ordered. People v. McFadden (1988) 524 N.Y.S.2d 902; People v. Santiago (1988) 524 N.Y.S.2d 893. Harrell v. State (Ala.Cr.App. 1985) 475 So.2d 650; Martinez v. State (Fla.App. 1982) 414 So.2d 301; Monahan v. State, (Fla.App. 1980) 390 So.2d 756.

People v. Patrick (1982) 135 Cal.App.3d 290 and dictum in People v. Holloway (1985) 176 Cal.App.3d 150; (where the court found the detention to be lawful making any further discussion of abandonment dictum), both Second District decisions, criticizes the First District's opinion in Menifee. As we have seen, the Menifee opinion is in conformance with the holdings of the United States Supreme Court and with what is "uniformly held" throughout the United States, in both federal and state courts. The Patrick decision criticizing Menifee is an aberrant anomaly. The weight of authority is overwhelmingly against the Patrick decision. See, recently, People v. Lee (1986) 186 Cal.App.3d 743, 751. And, most recently, Justice Low's opinion in

People v. Washington, supra.

In addition, the reasoning of the Patrick case was disapproved long ago in People v. Haven (1963) 59 Cal.2d 713. Earlier, it had been held that consent to search following an illegal detention or entry was not tainted by the preceding illegal police action. All such rulings were disapproved in Haven, and it is now well settled that consent following an illegal detention is per se invalid. People v. Alderson (1978) 86 Cal.App.3d 274; see also Florida v. Royer (1983) 460 U.S. 491 (consent after illegal detention is tainted).

Consent and abandonment are closely related: both are relinquishments of privacy. "Abandonment, like consent, must be freely given in order to be effective." United States v. Morin (5th Cir. 1982) 665 F.2d 765, 770 (abandonment of luggage by disclaimer was product of illegal detention, thus evidence in luggage suppressed). "[A]n unconstitutional seizure or arrest which prompts a disclaimer of property vitiates that act." United States v. Tolbert (6th Cir. 1982) 692 F.2d 1041, 1045.

Indeed, the Patrick rationale might just as easily apply in Florida v. Royer (1983) 460 U.S. 491. There was no threat to search Royer's luggage. All the same,

the Court held the luggage search tainted:

> Because we affirm the Florida District Court of Appeal's conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search. Florida v. Royer, 460 U.S. at 507-508.

Of course, the Patrick rationale is really a criticism of the decision in Reid v. Georgia (1980) 448 U.S. 438. The United States Supreme Court must be followed, though. And so must the rulings of the First District Court of Appeal in People v. Washington, supra, and People v. Menifee, supra. It's called stare decisis.

The purpose of the exclusionary rule is police deterence. If the Patrick rationale is followed, what is to stop an officer from unlawfully detaining individuals in the hope that they will discard contraband, knowing it can then be admitted into evidence?

CONCLUSION:

For the reasons stated above, the motion must be granted.

DATED: May 18, 1988

Respectfully submitted,

JAMES R. JENNER
PUBLIC DEFENDER

SIGNED BY JANICE M. BRICKLEY
ASSISTANT PUBLIC DEFENDER

FILED ALAMEDA COUNTY, MAY 19, 1988
RENE C. DAVIDSON, COUNTY CLERK

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

In the Matter of,

HODARI DULAN,

A Minor.

No. 141402

Department No. 25

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO SUPPRESS EVIDENCE

STATEMENT OF FACTS:

On April 18, 1988 at 2200 hours, Officers Pertoso and McColgin were on patrol as members of Special Duty Unit II. Officer McColgin was driving an unmarked car. As the officers turned onto 63rd Avenue, they saw the minor and three other male blacks clustered about the passenger side of a red car. The male blacks looked up and immediately all the individuals ran in different directions. The red car left the area at a high rate of speed. Officer McColgin pulled to the curb and Officer Pertoso got out of his car. At that time he was unable to see the minor or

any of the other male blacks. Officer Pertoso ran to an area he believed the individuals he had seen would run to. Officer McColgin drove around the block. Officer Pertoso ran down 63rd to Foothill and along Foothill. He ran to 6225 Foothill and ran east along the building. As he ran, he saw the minor running toward him looking over his shoulder. The minor then looked toward Officer Pertoso and discarded a loose rock of cocaine. At that time Officer Pertoso had said nothing to the minor. After he saw the minor drop the suspected cocaine, the officer placed the minor under arrest for possession of cocaine.

On May 12, 1988 the Honorable Wilmont Sweeney ruled that no probable cause existed to justify chasing the minor or to detain the minor prior to the minor dropping the cocaine.

THE THREAT OF AN ILLEGAL DETENTION DOES NOT REQUIRE THE COURT TO SUPPRESS EVIDENCE DISCARDED BY THE MINOR.

The minor contends that the evidence should be suppressed as a fruit of the poisonous tree of a threatened illegal detention. It is established as a sound premise that evidence which is the direct product of the exploitation of an illegal investigative stop must be suppressed. Courts have rejected in large measure the

corollary that evidence obtained as a result of a threat of illegal police detention should also be suppressed. (See People v. Patrick, 135 Cal.App.3d 290; In re Robert D., 95 Cal.App.3d 767; People v. Holloway, 176 Cal.App.3d 150).

In In re Robert D., a police officer attempted to stop the minor. The court specifically found that the officer had no right to stop or detain Robert. Robert, rather than stopping, sped off failing to yield, speeding and engaging in a hit and run accident. The court in that case said that "Robert had no right to commit numerous additional unlawful acts in order to avoid that which may concededly in the first instance have been an unjustified attempt at detention." (95 Cal.App.3d 767 at p. 772). The court said that one impropriety by the police does not give an individual carte blanche to break the law. (95 Cal.App.3d 767 at 772).

California courts have also distinguished between a threatened illegal detention and a threatened illegal search. While evidence discarded as a result of a threatened illegal search will be excluded, courts have distinguished situations where the detention is illegal but there is no threatened search. In both Restani v. Superior Court, 13 Cal.App.3d 189 and People v.

Robinson, 58 Cal.App.3d 363, the court distinguished between an illegal detention and a threatened illegal search. The court in Restani said that "the appropriate test is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'" (citations omitted) (Restani, 13 Cal.App.3d 189 at 197). The court in Restani noted that at no time did the officer indicate anything other than intent to identify the individual and held that Restani's actions were the product of his own decision rather than a threat of illegal search (see also People v. Siegenthaler, 7 Cal.3d 465).

Seemingly contra to this line of cases is People v. Menifee, 100 Cal.App.3d 235, which upheld a trial court's rulings suppressing evidence. Menifee involved a situation where an undercover officer approached Menifee, who he knew and who knew them. As Menifee and his companion turned and walked away, the officer briskly followed them and as he approached, first Menifee then his companion discarded narcotics. Based on the testimony, the court made factual findings that the narcotics were discarded as a result of a

threatened illegal detention. As noted in People v. Patrick, 135 Cal.App.3d 290, and People v. Holloway, 176 Cal.App.3d 150, the entire record upon which the trial court made its determination is not quoted in the opinion. In light of In re Robert D. and Restani v. Superior Court, it seems logical to infer that evidence was afforded the trial court that led the trial court to infer that an illegal search would necessarily and inevitably followed the detention.

Since Menifee, the Courts of Appeal have decided People v. Patrick 135 Cal.App.3d 290 and People v. Holloway, 176 Cal.App.3d 150. The court in Patrick confronted the opposing authorities of Menifee and Robinson and Restani. The court in Patrick held that "A defendant cannot immunize himself from damning evidence by discarding that evidence on his subjective assumption that an illegal search would follow his detention" (135 Cal.App.3d 290 at 294). In discussing whether abandonment of property would be fruit of illegal improper police practices, the court in Holloway said that "[I]t is only when a person has reasonable cause to believe his private possessions will inevitably be exposed to view by improper police practices that their attempted abandonment will be deemed the fruit of that

conduct." (176 Cal.App.3d 150) (emphasis added).

In People v. Washington, 192 Cal.App.3d 1120 the court again focused on whether the abandonment was sufficiently an act of free will and utilized the test set forth above citing Restani. (192 Cal.App.3d 1120 at 1126). The court cited several factors including the temporal proximity, the presence of intervening circumstances and the purpose of flagrancy of the official misconduct that courts should look to in determining whether the evidence should be suppressed. The court in Washington paid particular attention to the fact that the officers' testimony indicated a subjective belief that black males run from police when they have something to hide. The court stated that the single factor of race triggered the detention and triggered the type of police misconduct which offends our sense of justice (192 Cal.App.3d 1120 at 1128). Detentions which are based on the single factor such as race or religion or sex are totally without justification and courts have virtually without exception have excluded evidence obtained.

Applying the law stated above to the facts of this case, the evidence discarded by the minor should not be suppressed. The minor and three others fled upon

seeing the officers' car and by the time Officer Pertoso got out of the car, he had vanished from sight. No evidence has been presented to suggest that the minor saw the officer get out of the car and form the reasonable inferences drawn from the testimony of the officers, he did not see them. The officer did not directly chase the minor but ran to a place he believed was an "escape route" for the minors. Officer Pertoso did not say or do anything to the minor before the minor dropped the cocaine. Instead, the evidence shows that the minor's flight and discarding of the cocaine was prompted by the minor's "own awareness of the illicit nature of his activities that precipitated his effort" to get rid of the cocaine (176 Cal.App.3d 150), rather than getting rid of the cocaine as a result of a threatened illegal search.

Accordingly, petitioner requests that the minor's motion to suppress evidence pursuant to Welfare and Institutions Code section 700.1 be denied.

DATED: May 19, 1988.

Respectfully submitted,

JOHN J. MEEHAN
District Attorney

SIGNED by ANN KENFIELD
DEPUTY DISTRICT ATTORNEY

PROCEEDING

MR. WILLIAMS: THIS IS THE MATTER OF HODARI DULAN. YOU ARE HODARI DULAN?

THE DEFENDANT: YES.

MR. WILLIAMS: AND, YOU'RE HIS MOTHER, MA'AM?

MS. DULAN: YES.

MR. WILLIAMS: IT'S ON CALENDAR TODAY FOR A HEARING. THIS IS A 700.1 MOTION ALSO. HE IS REPRESENTED BY MS. BRICKLEY. PETITIONER IS MS. KENFIELD.

THE COURT: ALL RIGHT. DOES THE MINOR WAIVE FORMAL READING OF THE SUBSEQUENT PETITION AND THE SUPPLEMENTAL PETITION?

MS. BRICKLEY: YES, HE DOES.

THE COURT: DOES EITHER PARTY WISH TO PROCEED SOLELY ON THE SUPPRESSION MOTION FIRST?

MS. KENFIELD: YES.

THE COURT: ALL RIGHT. WE'LL PROCEED ONLY ON THE SUPPRESSION MOTION. YOU MAY PROCEED, MS. KENFIELD.

MS. KENFIELD: THANK YOU, YOUR HONOR. PETITIONER CALL OFFICER MCCOLGIN.

OFFICER BRIAN MCCOLGIN

(Having been duly sworn, was called on behalf of the Petitioner.)

THE CLERK: PLEASE STATE YOUR NAME.

THE WITNESS: MY NAME IS BRIAN MCCOLGIN.

THE CLERK: SPELL YOUR FIRST AND LAST NAME.

THE WITNESS: B-R-I-A-N M-C-C-O-L-G-I-N

DIRECT EXAMINATION

BY MS. KENFIELD: Q. OFFICER MCCOLGIN, YOU'RE EMPLOYED BY THE OAKLAND POLICE DEPARTMENT AS A POLICE OFFICER, IS THAT CORRECT?

A. YES.

Q. ON APRIL 18, 1988, AT 22:00 HOURS WERE YOU ON DUTY?

A. YES.

Q. WHAT WAS YOUR ASSIGNMENT?

A. WE WERE – IT WAS SPECIAL DUTY UNIT 2 DRUG TASK FORCE ON MURDER PATROL.

Q. AND, WERE YOU ALONE OR WITH A PARTNER?

A. WITH A PARTNER.

Q. WHO WAS YOUR PARTNER?

A. OFFICER JERRY PERTOSO, P-E-R-T-O-S-O.

Q. AND YOU AND OFFICER PERTOSO WERE BOTH DRESSED IN STANDARD TASK FORCE UNIFORM, THAT IS, A BLUE JACKET WITH THE WORD POLICE WRITTEN ON THE FRONT AND BACK, BLUE JEANS, GUN BELT AND TENNIS SHOES?

A. YES.

Q. WERE YOU IN A TYPE OF CAR?

A. YES.

Q. WHAT TYPE OF CAR WERE YOU IN?

A. BROWN DODGE.

Q. APPROXIMATELY TEN O'CLOCK IN THE EVENING, WHERE WERE YOU.

A. IN THE AREA OF 2663 63RD AVENUE.

Q. AND, WHO WAS DRIVING?

A. I WAS.

Q. AND, WHICH WAY WERE YOU PROCEEDING ON 63RD AVENUE?

A. SOUTHBOUND FROM FOOTHILL BOULEVARD.

Q. WHICH WAY WERE YOU GOING ON FOOTHILL?

A. WESTBOUND.

Q. DID YOU NOTICE ANYTHING AS YOU TURNED FROM WESTBOUND FOOTHILL TO SOUTHBOUND 64TH AVENUE?

A. YES.

Q. WHAT DID YOU SEE?

A. WE SAW APPROXIMATELY FOUR TO FIVE MALE BLACKS. THEY WERE STANDING AROUND A RED COMPACT CAR WHICH WAS PARKED IN A SOUTHBOUND DIRECTION ALONG THE WEST CURB.

Q. AND, ARE YOU FAMILIAR WITH THE ADDRESS IT WAS IN FRONT OF?

A. YES.

Q. AND, HOW ARE YOU FAMILIAR WITH IT?

A. IT'S AN AREA OF HIGH NARCOTIC ACTIVITY WHERE PERTOSO AND I HAVE PARTICIPATED IN SEVERAL NARCOTIC RELATED ARRESTS.

Q. AND, AS YOU BEGAN TO PROCEED SOUTHBOUND ON 64TH AVENUE, WHAT IF ANYTHING OCCURRED?

A. JUST AS WE TURNED SOUTHBOUND, A COUPLE MEMBERS OF THE GROUP I THINK LOOKED UP AT US AND THEN THEY STARTED RUNNING AND THE CAR TOOK OFF SOUTHBOUND.

Q. AND, WHEN YOU SAY THE CAR TOOK OFF SOUTHBOUND, HOW DID IT DO SO?

A. IT APPEARED TO DRIVE OFF RATHER QUICKLY.

Q. WHEN YOU SAY THE MEMBERS OF THE GROUP TOOK OFF RUNNING, WHAT DIRECTION DID THEY RUN?

A. TWO OF THE PERSONS IN THE GROUP RAN SOUTHBOUND ON 64TH AND THEN RAN IN A WESTBOUND DIRECTION TOWARDS 2663 63RD AVENUE WHICH IS AN APARTMENT COMPLEX, WHICH IS LOCATED THERE AND THEN THE OTHER TWO RAN WESTBOUND TO THE REAR OF AN ABANDONED BURNED HOUSE THAT'S LOCATED JUST NORTH OF 2663.

Q. AT THAT POINT, DID YOU OR OFFICER PERTOSO ACTIVATE ANY EMERGENCY EQUIPMENT?

A. NO.

Q. HAD YOU SAID ANYTHING?

A. NO.

Q. WHAT, IF ANYTHING, OCCURRED NEXT?

A. I PULLED UP TO THE LOCATION WHERE THEY HAD RUN FROM AND THEN OFFICER PERTOSO GOT OUT AND HE RAN NORTHBOUND ON 63RD AND WESTBOUND ON FOOTHILL.

Q. DID YOU THEN LOSE SIGHT OF HIM?

A. YES.

Q. DID YOU GET OUT OF THE CAR?

A. NOT AT THAT TIME, NO.

Q. WHAT, IF ANYTHING, DID YOU DO?

A. I DROVE AROUND THE BLOCK. I DROVE SOUTHBOUND ON 63RD THEN WESTBOUND ON BANCROFT AND NORTHBOUND ON 62ND AVENUE.

Q. WHAT WAS YOUR PURPOSE IN DOING THAT?

A. BASED ON THE ACTIONS THAT WE HAD SEEN AND OUR EXPERIENCE IN THE AREA, WE BELIEVED THAT THERE WAS SOME TYPE OF ILLEGAL ACTIVITY OCCURRING THERE.

Q. ANY PARTICULAR TYPE OF ILLEGAL ACTIVITY?

A. NARCOTIC RELATED.

Q. WHAT WAS YOUR PURPOSE IN DRIVING AROUND THE BLOCK?

A. WE WANTED TO STOP THE INDIVIDUALS WHO HAD RUN AND FIND OUT WHO THEY WERE AND WHAT THEIR PURPOSE WAS FOR BEING THERE IN THE AREA.

Q. WHAT, IF ANYTHING, AS YOU DROVE AROUND THE BLOCK, DID YOU SEE ANYTHING OR HEAR ANYTHING THAT ATTRACTED YOUR ATTENTION?

A. YES.

Q. WHAT, IF ANYTHING, DID YOU HEAR OR SEE?

A. OVER THE RADIO, OFFICER PERTOSO ADVISED ME THAT HE HAD ONE OF THE PEOPLE STOPPED ON FOOTHILL IN ONE OF THE YARDS THERE.

Q. WHAT, IF ANYTHING, DID YOU DO?

A. I DROVE AND I SAW OFFICER PERTOSO. HE HAD DETAINED THE DEFENDANT.

Q. DO YOU SEE THE PERSON OFFICER PERTOSO DETAINED IN THE COURTROOM TODAY?

A. YES.

Q. COULD YOU POINT HIM OUT -- INDICATE WHERE HE'S SITTING?

A. HE'S SITTING AT THE DEFENSE TABLE, MALE BLACK, WEARING TAN JACKET AND BLUE PANTS.

THE COURT: THE RECORD WILL SHOW HE IS INDICATING THE MINOR IN THIS CASE.

MS. KENFIELD: THANK YOU, YOUR HONOR.

BY MS. KENFIELD: Q. WHAT OCCURRED AFTER YOU ARRIVED AT OFFICER PERTOSO'S LOCATION?

A. JERRY HAD THE SUSPECT HANDCUFFED AND HE TOLD ME THAT HE HAD DROPPED A ROCK OF COCAINE -- SUSPECTED COCAINE -- AND JERRY WAS HOLDING THAT IN HIS HAND AND HE PLACED THE SUSPECT UNDER ARREST FOR 11350 OF THE HEALTH AND SAFETY CODE.

Q. DID YOU CONDUCT A SEARCH OF THE AREA ALONG THE ROUTE THAT THE INDIVIDUALS HAD RUN?

A. YES.

Q. DID YOU FIND ANYTHING?

A. YES.

Q. WHAT, IF ANYTHING, DID YOU FIND?

A. I FOUND A CLEAR PLASTIC SANDWICH BAG. INSIDE OF IT WAS SEVERAL SMALL CLEAR ZIP-LOCK BAGS AND APPROXIMATELY I THINK IT'S ABOUT 15 OFF-WHITE COLORED CHUNKS OF SUSPECTED COCAINE.

Q. AND DID OFFICER PERTOSO GIVE YOU THE SUSPECTED CHUNKS OF COCAINE THAT HE HAD RECOVERED?

A. YES.

Q. WHAT DID YOU DO WITH THEM?

A. IT WAS PACKAGED AND THEN PLACED IN THE CRIMINALISTIC ENVELOPE AND LATER TURNED INTO THE CRIMINALISTIC SECTION OF THE OAKLAND POLICE DEPARTMENT.

MS. KENFIELD: YOUR HONOR, I'D LIKE TO HAVE MARKED PETITIONER'S NUMBER ONE, OAKLAND POLICE DEPARTMENT EVIDENCE ENVELOPE WITH THE SUSPECT'S NAME, HODARI DULAN, THE ENVELOPE WITH THE NUMBER D2317-88, THE REPORT 88-44699, AND OFFICER MCCOLGIN'S NAME ON IT. I'D LIKE THAT TO BE MARKED AS PETITIONER'S NUMBER ONE.

THE COURT: EVIDENCE ENVELOPE AND CONTENTS WILL BE NUMBER ONE FOR IDENTIFICATION.

(WHEREUPON PETITIONER'S NO. 1, EVIDENCE ENVELOPE AND CONTENTS WERE MARKED FOR IDENTIFICATION.)

BY MS. KENFIELD: Q. AND, PETITIONER'S NUMBER ONE, DO YOU RECOGNIZE IT?

A. YES, I DO.

Q. WHAT IS THAT?

A. THIS IS THE CRIMINALISTIC ENVELOPE THAT I PLACED SUSPECTED NARCOTICS IN THAT WERE SEIZED THAT NIGHT AND THAT WERE TURNED INTO THE CRIMINALISTIC SECTION OF THE OAKLAND POLICE DEPARTMENT.

Q. I WOULD ASK TO CHECK YOUR SEALS AND TELL ME IF YOUR SEALS ARE STILL IN TACT.

A. YES.

MS. KENFIELD: YOUR HONOR, MAY THE RECORD REFLECT I AM OPENING PETITIONER'S NUMBER ONE AND REMOVING FROM IT A ZIP-LOCK BAGGY THAT IS SEALED WITH AN OAKLAND POLICE DEPARTMENT EVIDENCE STICKER, IT'S NUMBERED NUMBER ONE, THE DATE 5-9-88, CRIMINALISTIC VICE NUMBER D2317-88, .06 GRAMS. THE NUMBERS WRITTEN ON THE ENVELOPE IS 7469P. INSIDE THE ENVELOPE IS A CHUNK OF OFF-WHITE ROCKY MATERIAL.

THE COURT: YOU'RE USING THE WORD ENVELOPE AND YOU'RE ALSO I THINK, WITH REFERENCE TO THE EVIDENCE DOCUMENT.

MS. KENFIELD: THIS WOULD BE A CLEAR GLASSINE ENVELOPE ZIP-LOCK BAGGY.

THE COURT: ALL RIGHT.

MS. KENFIELD: I'D LIKE THAT MARKED 1-A. MAY THE RECORD REFLECT I ALSO REMOVED FROM PETITIONER'S NUMBER 1, AN OLD FASHION PLASTIC BAGGY INSIDE THAT IS SEALED WITH A PIECE OF TAPE, THE INITIAL "L" AND SOMETHING ELSE I CAN'T READ OR "P" I CAN'T READ IT – NUMBER 2, BUT IT IS SEALED WITH A PIECE OF TAPE. INSIDE IS A GLASSINE ENVELOPE CONTAINING A LARGE NUMBER OF OFF-WHITE ROCKY MATERIAL CHUNKS. THAT ENVELOPE IS SEALED ON THE INSIDE WITH AN OAKLAND POLICE DEPARTMENT EVIDENCE STICKER LABELED "2", DATED 5-9-88 – D2317-18, THE NUMBER IS 7.43 GRAMS. ALSO, IN ADDITION TO THE LARGER PLASTIC BAGGY, THERE ARE A NUMBER OF SMALLER ONE BY ONE AND A HALF INCH ZIP-LOCK BAGGIES. TEN OF THEM AND EACH OF THEM CONTAINS AN OFF-WHITE ROCKY MATERIAL.

THE COURT: THAT LARGER PLASTIC BAGGY AND CONTENTS WILL BE 1-B FOR IDENTIFICATION.

(WHEREUPON PETITIONER'S 1-B, LARGER PLASTIC BAGGY AND CONTENTS WERE MARKED FOR IDENTIFICATION.)

BY MS KENFIELD: Q. HANDING YOU 1-A, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS THE CHUNK OF SUSPECTED COCAINE THAT WAS RECOVERED BY OFFICER PERTOSO AND LATER GIVEN TO ME.

Q. HANDING YOU 1-B, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS A CLEAR PLASTIC SANDWICH BAG AND INSIDE IT CONTAINS SEVERAL WHITE CHUNKS OF SUSPECTED COCAINE.

Q. WHERE EXACTLY DID YOU FIND THIS OFFICER PERTOSO -- EXCUSE ME, OFFICER MCCOLGIN?

A. I FOUND IT -- I'M NOT SURE THE ADDRESS, IT'S ONE HOUSE NORTH OF 2663 63RD AVENUE. IT'S AN ABANDONED WHITE HOUSE AND IT'S BEEN BURNED DOWN KIND OF. THERE'S A SMALL SET OF STAIRS THAT'S LOCATED ON THE NORTH SIDE OF THIS HOUSE AND THE BAG WAS LYING ON THE BOTTOM STAIR.

Q. AND WHERE WAS THAT IN LOCATION TO WHERE YOU SAW THIS MINOR RUN.

MS. BRICKLEY: YOUR HONOR, I OBJECT TO THIS LINE OF QUESTIONING WITH REGARD TO THIS BAG. MY CLIENT WAS CHARGED -- IS CHARGED WITH AN 11350. IT WAS MY UNDERSTANDING THAT WAS BASED ON THE BAG THAT HE WAS ALLEGEDLY SEEN TO HAVE DROPPED AND NOT ON THIS ONE ROCK THAT HE WAS ALLEGEDLY SEEN TO HAVE DROPPED BUT NOT ON THIS EVIDENCE. I DON'T SEE RELEVANCE OF IT.

THE COURT: WELL, I SEE IT'S QUITE RELEVANT. I DON'T KNOW WHAT YOU'RE UNDERSTANDING WHAT IT'S BASED UPON, BUT IT'S CERTAINLY RELEVANT. IT IF SHOWS HE DROPPED IT, I ASSUME THEY WANT TO ARGUE THAT HE POSSESSED IT BEFORE HE DROPPED IT. GO AHEAD.

MS. BRICKLEY: I'LL RENEW MY OBJECTION.

THE COURT: WELL, IT'S CERTAINLY RELEVANT IF THEY CAN PROVE THE CASE ON THAT. GO AHEAD.

BY MS. KENFIELD: Q. WHERE WAS THE BAGGY WITH RESPECT TO WHERE YOU SAW THE MAN RUN?

A. THE TWO PEOPLE THAT WE SAW RUN, RAN NORTH OF THAT WHITE HOUSE THAT'S BURNED DOWN AND THEY RAN PAST THAT STAIRWELL.

Q. NOW, DID YOU LOSE SIGHT OF THEM AT ANY POINT?

A. YES.

Q. AND, AT WHAT POINT DID YOU LOSE SIGHT OF THEM?

A. WHEN THEY ORIGINALLY RAN AND THEY RAN INTO THE YARD. THERE ARE SEVERAL TREES AND THAT'S WHERE WE LOST SIGHT OF THEM.

Q. WHEN YOU LOST SIGHT OF THEM, WAS OFFICER PERTOSO IN THE CAR OR OUT OF THE CAR?

A. WE WERE JUST PULLING UP. I GUESS JERRY WAS JUST GETTING OUT.

Q. MS. KENFIELD: NO FURTHER QUESTIONS.

THE COURT: CROSS?

<u>CROSS-EXAMINATION</u>

BY MS. BRICKLEY: Q. OFFICER, WHEN YOU SAID THAT THESE FOUR INDIVIDUALS STARTED RUNNING IMMEDIATELY WHEN YOU TURNED THE CORNER THERE --

A. ALMOST IMMEDIATELY, YES.

Q. OKAY. AT THAT POINT, DID YOU RECOGNIZE ANY OF THE INDIVIDUALS?

A. NO.

Q. AND, YOU SAY OFFICER PERTOSO GOT OUT OF THE CAR IN ORDER TO CHASE, AT LEAST CHASE TWO OF THEM THAT HAD GONE IN THE DIRECTION OF THE HOUSE.

A. OKAY.

Q. AND, YOU THEN CONTINUED TO DRIVE THE VEHICLE ALSO TRYING TO CATCH UP WITH THEM?

A. YES.

Q. AND, YOUR PURPOSE WAS TO STOP AND QUESTION THEM?

A. YES.

Q. NOW, THE BAG WITH THE NUMEROUS ROCKS IN IT, DID YOU SEE THAT IN ANYONE'S POSSESSION?

A. NO.

Q. OKAY. DID OFFICER PERTOSO SAY THAT HE HAD SEEN THAT IN ANYONE'S POSSESSION?

A. NO, MA'AM.

Q. OKAY. AND, THE CAR THAT YOU SAW THESE MALE BLACKS STANDING AROUND, WAS A PARKED VEHICLE?

A. IT WAS PARKED WHEN WE SAW IT, YES.

MS. BRICKLEY: NO FURTHER QUESTIONS.

THE COURT: REDIRECT?

REDIRECT EXAMINATION

BY MS. KENFIELD: Q. WHEN YOU DROVE UP TO WHERE YOU STOPPED AND OFFICER PERTOSO – STRIKE THAT.

WITHDRAW THAT. I HAVE NO FURTHER QUESTIONS.

THE COURT: MAY THE WITNESS BE EXCUSED?

MS. KENFIELD: YES.

MS. BRICKLEY: YES.

THE COURT: YOU'RE EXCUSED. OFFICER, WHO IS THE – WHATEVER PROPER TERM, THE DIRECTOR OR COMMANDING OFFICER WHO WAS IN CHARGE OF THE ARRESTING?

THE WITNESS: THAT'S SERGEANT JAMES BEAL, B-E-A-L.

THE COURT: WHAT TELEPHONE NUMBER REACHES HIM?

THE WITNESS: 273-3224.

THE COURT: THANK YOU VERY MUCH. YOU'RE EXCUSED. NEXT WITNESS.

MS. KENFIELD: OFFICER PERTOSO WILL BE COMING IN.

OFFICER JERRY PERTOSO

(HAVING BEEN DULY SWORN, WAS CALLED ON BEHALF OF THE PETITIONER.)

THE CLERK: STATE YOUR NAME, PLEASE.

THE WITNESS: JERRY, J-E-R-R-Y PERTOSO, P-E-R-T-O-S-O.

THE CLERK: THANK YOU.

DIRECT EXAMINATION

BY MS. KENFIELD: Q. OFFICER PERTOSO, YOU'RE EMPLOYED BY THE

OAKLAND POLICE DEPARTMENT S.D.U. 2 TASK FORCE, IS THAT RIGHT?

A. YES.

Q. IS THAT TASK FORCE, IS THAT YOUR CURRENT ASSIGNMENT?

A. YES.

Q. ON APRIL 18, 1988 AT APPROXIMATELY 10:00 P.M., WERE YOU ON DUTY?

A. YES.

Q. WHERE WERE YOU?

A. WE WERE IN THE VICINITY OF 2600 BLOCK OF 63RD AVENUE.

Q. AND, WHICH DIRECTION WERE YOU GOING?

A. WE WERE GOING WESTBOUND ON FOOTHILL.

Q. AND, AS YOU APPROACHED 63RD AVENUE, DID YOU SEE ANYTHING THAT ATTRACTED YOUR ATTENTION?

A. YES.

Q. BY THE WAY, I TAKE IT THAT YOU WERE DRESSED IN STANDARD S.D.U. 2 UNIFORM?

A. YES.

Q. AND, WAS OFFICER MCCOLGIN DRIVING?

A. YES.

Q. WAS THAT VEHICLE MARKED THAT YOU WERE IN, MARKED IN ANY WAY?

A. NO.

Q. WHAT DID YOU SEE?

A. AS WE GOT TO THE CORNER OF 63RD AVENUE AND FOOTHILL, WE WENT IN A SOUTHBOUND DIRECTION AND WE NOTICED THAT FOUR YOUNG GUYS HUDDLED AROUND THE RIGHT SIDE OF A RED CAR.

Q. AND, AS YOU CONTINUED TO MAKE THE TURN, WHAT IF ANYTHING HAPPENED?

A. A COUPLE OF GUYS LOOKED UP TOWARDS US AND TWO OF THEM RAN LIKE IN AN SOUTHBOUND DIRECTION TO THE REAR OF AN APARTMENT COMPLEX THAT'S AT 2663, AND TWO OF THE OTHER FELLAS RAN WESTBOUND IN THE REAR OF LIKE AN ABANDONED WHITE HOUSE THAT'S BURNED OUT – I THINK IT'S 2665 63RD AVENUE.

Q. WHAT, IF ANYTHING ELSE OCCURRED?

A. I ENDED UP ARRESTING THIS MAN OVER HERE.

Q. LET ME BACK UP. DID YOU SEE THE CAR DO ANYTHING?

A. YES.

Q. WHAT DID THE CAR DO?

A. IT PROCEEDED SOUTHBOUND AT A HIGH RATE OF SPEED AFTER THE OTHERS RAN.

Q. HOW FAR WERE YOU FROM THE CAR AT THE TIME THE FOUR BOYS RAN AND THE CAR DROVE OFF?

A. PROBABLY ABOUT 40 YARDS OR SO.

Q. HOW WOULD YOU DESCRIBE THE MANNER IN WHICH THE RED CAR DROVE OUT?

A. OFF IN A HIGH RATE OF SPEED AS IF TO GET OUT OF THE AREA AS QUICKLY AS POSSIBLE.

MS. BRICKLEY: I WOULD OBJECT TO THE LATER PART AS BEING AN OPINION.

MS. KENFIELD: IT WAS NOT RAISED AS A CONCLUSION.

THE COURT: HIS RESPONSES, "OFF IN A HIGH RATE OF SPEED" WILL STAY IN. THE REST OF IT WILL GO OUT.

BY MS. KENFIELD: Q. WHAT, IF ANYTHING, DID YOU AND OFFICER MCCOLGIN DO NEXT?

A. I GOT OUT OF MY CAR AND RAN NORTHBOUND ON 63RD AVENUE.

Q. DID YOU RUN THE SAME WAY YOU SAW THE -- ANY OF THE PEOPLE RUN?

A. NO.

Q. WHAT DID YOU BELIEVE HAD JUST OCCURRED?

A. BASED ON THE AREA AND MY OBSERVATIONS, I BELIEVE THAT WE INTERRUPTED SOME TYPE OF NARCOTIC ACTIVITY.

Q. AND, HAD YOU WORKED IN THIS AREA BEFORE?

A. YES, I'VE PARTICIPATED IN NUMEROUS ARRESTS FOR SALES OF NARCOTICS, POSSESSION OF NARCOTICS FOR SALE AT THE SAME LOCATION WHERE I SAW THESE GUYS.

Q. AND, WHEN YOU GOT OUT OF THE CAR, WERE YOU ABLE TO SEE ANY OF THE INDIVIDUALS?

A. NO, I COULDN'T SEE THEIR FACES.

Q. WHEN WAS IT THAT YOU AND OFFICER MCCOLGIN -- STRIKE THAT. DID YOUR CAR STOP?

A. JUST FOR A BRIEF SECOND.

Q. BY THE TIME YOU HAD GOTTEN OUT OF THE CAR, ALL THE INDIVIDUALS WERE OUT OF SIGHT?

A. YES.

Q. WHEN YOU GOT OUT OF THE CAR AND YOU RAN, WHERE DID YOU RUN TO?

A. I RAN TO THE EAST SIDE OF I THINK IT'S 6225 FOOTHILL.

Q. HOW DID YOU GET THERE?

A. I RAN NORTHBOUND ON 63RD AVENUE AND WESTBOUND ON TO FOOTHILL.

Q. AND, AS YOU WENT EASTBOUND ALONG 6225 FOOTHILL, DID YOU SEE ANYTHING THAT ATTRACTED YOUR ATTENTION?

A. I NOTICED THIS MAN SEATED AT DEFENSE TABLE IN A TAN JACKET AND BLUE JEANS. HE WAS RUNNING NORTHBOUND TOWARDS ME BUT HE WAS LOOKING OVER HIS SHOULDER AS IF TO BE LOOKING FOR SOMEONE TO FOLLOW HIM.

Q. MS. KENFIELD: MAY THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE MINOR IN THIS ACTION.

THE COURT: YES.

BY MS. KENFIELD: Q. WHAT, IF ANYTHING, OCCURRED AS YOU SAW THIS MINOR RUNNING AND LOOKING BEHIND HIM?

A. WELL, AS I GOT ABOUT FROM WHERE I AM TO WHERE HE'S SEATED, IN LIKE -- IN A UNDERHAND SCOOPING MOTION WITH

THE RIGHT HAND, HE DISCARDED A SINGLE LOOSE ROCK TO THE SIDEWALK ALONG THE SIDE OF THE HOUSE.

MS. KENFIELD: YOUR HONOR, INDICATING.

THE COURT: HOLD IT JUST A MOMENT. THE DISTANCE BETWEEN THE WITNESS AND THE MINOR IS ABOUT 11 FEET. ALL RIGHT. GO AHEAD.

BY MS. KENFIELD: Q. HAD YOU SAID ANYTHING TO THE MINOR AT THAT POINT?

A. NO.

THE COURT: I'M SORRY, YOU SAID WHEN YOU GOT ABOUT THAT DISTANCE YOU SAW HIM DO WHAT?

THE WITNESS: HE DISCARDED A LOOSE ROCK TO THE GROUND WITH HIS RIGHT HAND IN A BACKWARD MOTION.

THE COURT: ALL RIGHT. YOU MAY CONTINUE.

BY MS. KENFIELD: Q. HAD YOU SAID ANYTHING TO HIM AT THAT POINT?

A. NO.

Q. HAD YOU DONE ANYTHING AT THAT POINT OTHER THAN YOUR BEING WHERE YOU ARE?

A. NO.

Q. WHAT DID YOU DO AT THAT POINT?

A. AT THAT POINT, HE CONTINUED TOWARDS ME. I FORCED HIM ON TO THE GRASS AND HANDCUFFED HIM.

Q. WHEN HE THREW THE ROCK, DID YOU HAVE ANY SUSPICION AS TO WHAT THAT WAS?

A. IT WAS IDENTIFIED AS BASE ROCK COCAINE.

Q. AT ANY POINT, DID YOU RETRACE THE ROUTE FROM WHERE YOU SAW THE MINOR DISCARD THE SUSPECTED COCAINE TO WHERE YOU INITIALLY SAW THE MINOR?

A. MY PARTNER DID.

Q. HOW MUCH TIME ELAPSED BETWEEN THE TIME THAT YOU INITIALLY SAW THE MINOR AND THE TIME YOU SAW HIM DISCARD THE ROCK OF COCAINE?

A. OH, LESS THAN A MINUTE.

Q. MS. KENFIELD: NO FURTHER QUESTIONS.

THE COURT: CROSS?

<u>CROSS-EXAMINATION</u>

BY MS. BRICKLEY: Q. OFFICER, YOU SAY YOU SAW FOUR YOUNG MEN HUDDLED AROUND A CAR. BY HUDDLED, YOU MEAN THEY WERE STANDING AROUND THE CAR?

A. YES.

Q. YOU DIDN'T SEE ANY MONEY?

A. NO.

Q. YOU DIDN'T SEE ANY DRUGS?

A. NO.

Q. OKAY. YOU SAID THE CAR TOOK OFF AT A HIGH RATE OF SPEED. ABOUT APPROXIMATELY HOW FAST WAS THAT CAR GOING?

A. I COULDN'T PACE IT BUT IT TOOK OFF FROM A PARKED POSITION AT AN UNREASONABLE SPEED FOR THE AREA.

Q. AND, APPROXIMATELY, WHAT WOULD THAT SPEED BE?

A. WELL, I COULDN'T TELL YOU.

Q. SO, IT WAS JUST OVER THE SPEED LIMIT?

A. I DON'T THINK IT REACHED 25 AT THE STOP SIGN, BUT IT TOOK OFF UNREASONABLY FAST FOR WHAT HE WAS PARKED AT.

Q. WHEN YOU GOT OUT OF THE CAR, YOU WERE RUNNING AFTER THESE INDIVIDUALS, IS THAT CORRECT?

A. NO, I DIDN'T FOLLOW THOSE GUYS AT ALL.

Q. BUT YOU WERE RUNNING IN ORDER TO CUT THEM OFF?

A. OH, YES.

Q. YOUR INTENTION WAS TO TRY TO DETAIN THESE INDIVIDUALS?

A. YES, I WANTED TO CONTACT THEM AND FIND OUT WHAT THEY WERE ABOUT.

Q. OKAY. AND, YOU SAW TWO GOING TOWARDS THIS ABANDONED HOUSE, IS THAT CORRECT?

A. YES.

Q. OKAY. AND, THAT WAS WHAT DIRECTION WERE THOSE TWO RUNNING THEN?

A. THEY WOULD BE RUNNING IN A WESTBOUND DIRECTION.

Q. ON WHAT STREET?

A. OFF OF 63RD AVENUE.

Q. OFF. SO, THEY WEREN'T ON THE STREET, THEY WERE RUNNING TOWARDS A HOUSE?

A. WELL, THEY WERE INITIALLY ON THE STREET THEN THEY RAN THROUGH A LITTLE CYCLONE FENCE -- THERE'S A GATE, AND THEN THEY RAN IN A WESTBOUND DIRECTION OUT OF MY SIGHT.

Q. OKAY. AND, UM -- OFFICER MCCOLGIN PROCEEDED IN HIS CAR ALSO TRYING TO FOLLOW THEM OR CUT THEM OFF, IS THAT CORRECT?

A. I CAN'T SAY EXACTLY WHAT HIS INTENTIONS WERE. HE DROVE SOUTHBOUND ON 63RD AVENUE., I GOT OUT OF THE CAR.

Q. OKAY. SO, WHEN YOU GOT SIGHT OF -- LOST SIGHT OF THE MINOR HERE, WHERE WERE YOU?

A. I HAD NOT EVEN GOTTEN OUT OF THE CAR YET.

Q. I MEAN WHEN YOU SAW HIM. LET ME STRIKE THAT. WHEN YOU SAW HIM DISCARD THE OBJECT, WHERE WERE YOU?

A. I WAS ON THE EAST SIDE OF 6225 FOOTHILL.

Q. WHERE WERE YOU STANDING?

A. ON THE SIDEWALK AREA OF THE HOUSE.

Q. OKAY. AND, YOU SAID THE INDIVIDUAL WAS LOOKING OVER HIS SHOULDER?

A. HE WAS LOOKING BACK INITIALLY AND WHEN HE SAW ME, HE HAD A STARTLED LOOK ON HIS FACE.

Q. OKAY. AND, WERE YOU STILL RUNNING AT THAT TIME?

A. PARDON?

Q. WERE YOU STILL RUNNING WHEN YOU SAW HIM DISCARD THE OBJECT?

A. YES, I WAS.

Q. MS. BRICKLEY: I DON'T HAVE ANY OTHER QUESTIONS.

THE COURT: REDIRECT?

MS. KENFIELD: NOTHING FURTHER.

THE COURT: JUST A MOMENT. YOU SAID HE LOOKED UP, APPARENTLY SAW YOU AND GOT A STARTLED LOOK ON HIS FACE. HAD HE ALREADY THROWN THE ROCK DOWN WHEN HE LOOKED AT YOU WITH THAT STARTLED LOOK OR DID HE THROW THE ROCK DOWN AFTER HE LOOKED AT YOU WITH THAT STARTLED LOOK?

THE WITNESS: IT WAS AFTER HE LOOKED AT ME.

THE COURT: AND, AT THE TIME THAT YOU WERE RUNNING, WHEN HE GOT THAT STARTLED LOOK ON HIS FACE, WERE YOU RUNNING TOWARDS HIM?

THE WITNESS? YES, I WAS RUNNING TOWARDS HIM.

THE COURT: THE COURT HAS NO FURTHER QUESTIONS. OTHER QUESTIONS BY COUNSEL?

MS. KENFIELD: NOTHING FURTHER.

MS. BRICKLEY: NOTHING.

THE COURT: MAY THE WITNESS BE EXCUSED?

MS. KENFIELD: WELL, NO. HE'S GOT TO WAIT.

THE COURT: ALL RIGHT. YOU MAY STEP DOWN. NEXT WITNESS?

MS. KENFIELD: NO FURTHER WITNESSES.

THE COURT: MS. BRICKLEY?

MS. BRICKLEY: WELL, TO ME THIS SEEMS LIKE A PRETTY CLEAR CUT CASE OF --

THE COURT: ARE YOU OFFERING THE EVIDENCE?

MS. BRICKLEY: NO, I'M SORRY. I'M JUST ARGUING. I'M SORRY. TO ME, THIS SEEMS LIKE A PRETTY CLEAR CUT CASE OF A THREAT OF AN ILLEGAL DETENTION A MENIFEE TYPE ISSUE WHERE THE DETENTION WAS SO CLEARLY UNLAWFUL. THERE ARE A NUMBER OF CASES WHICH ARE VERY CLOSE AND THERE'S ONE WHICH IS DIRECTLY ON POINT AND THE FACTS ARE ALMOST IDENTICAL TO THIS CASE AND THAT IS A VERY RECENT CASE OF PEOPLE VERSUS WASHINGTON AT 192: CAL.APP.3D: 1120. I HAVE A COPY OF THAT CASE AND IN THAT CASE, THE OFFICER OBSERVED A GROUP OF MEN, AGAIN HUDDLED IN A FORMATION WITH A LOT OF HAND MOVEMENTS, SO THERE'S EVEN THAT ADDITIONAL ELEMENT IN THAT CASE. THE GROUP LOOKED AT THE OFFICER, STARTED TO WALK AWAY AT A FAST PACE. THE OFFICER FOLLOWED AND THEN THE DEFENDANT IMMEDIATELY RAN AWAY AND DISCARDED AN OBJECT. AND, THE COURT HELD THAT THAT WAS A THREAT OF AN ILLEGAL DETENTION. THE FACT THAT IT WAS A HIGH NARCOTICS AREA DID NOT MATTER.

THERE'S NUMEROUS CASES THAT SAY THAT IS NOT SUFFICIENT REASON TO STOP

PEOPLE. IN THIS CASE, THERE WAS SIMPLY SOME BOY STANDING AROUND A CAR, PARKED CAR, THE CAR WASN'T DOING ANYTHING ILLEGAL. THEY'RE STANDING AROUND A CAR AND THESE OFFICERS REACHED A CONCLUSION FROM THAT THAT THERE MAY BE SOME DRUG ACTION GOING ON AND THEY GO CHASING THESE INDIVIDUALS AND THE MINOR CLEARLY DROPS THE OBJECT AND RESPONDS TO THAT, THAT HE SEES THE OFFICER, IS STARTLED AND DROPS THE OBJECT. IT'S CLEARLY IN RESPONSE TO THIS THREAT OF DETENTION. THE OFFICERS ARE QUITE FRANK THAT THAT WAS THEIR INTENTION TO DETAIN THESE INDIVIDUALS.

TO ME, THERE ARE NO ARTICULATE FACTS. IT MAY HAVE BEEN A HUNCH, BUT THAT'S NOT SUFFICIENT. THERE WERE NO ARTICULATE FACTS TO JUSTIFY A DETENTION AT THAT POINT. THERE ARE A NUMBER OF OTHER CASES THAT ARE NOT AS CLOSE AS WASHINGTON BUT VERY SIMILAR SITUATIONS WHERE SOMEBODY RUNS AWAY OR TRYS TO AVOID A POLICE OFFICER AND THE COURTS HOLD THAT THAT'S NOT SUFFICIENT.

THOSE WOULD BE PEOPLE VERSUS ALDRIDGE, CALIFORNIA SUPREME COURT CASE THAT ADDRESSES THE ISSUE; 35; CAL.APP.3D 473 AND THAT CASE IS A GROUP. AN OFFICER SUSPECTS -- SEES A GROUP, AGAIN STANDING AROUND. THEY SUSPECT IN AN AREA WHERE THERE ARE DRUG TRANSACTIONS AND PEOPLE WITH WEAPONS. THEY SUSPECT IN AN AREA WHERE THERE ARE DRUG TRANSACTIONS AND PEOPLE WITH WEAPONS. THEY SUSPECT SOMEBODY IN THE GROUP MAY HAVE DRUGS OR ILLEGAL WEAPONS. THE GROUP STARTS TO DISBURSE AS THE POLICE CAR COMES IN THE LOT. FOUR MEN, INCLUDING THE DEFENDANT FIRST WALK AND THEN RUN. THE COURT AGAIN SAYS NOT ENOUGH. WE CANNOT DETAIN UNDER THOSE CIRCUMSTANCES. A PERSON HAS A RIGHT TO AVOID A POLICE OFFICER. IN THIS CASE, THE ONLY THING I

SEE IS THE FACT THAT THESE PEOPLE HAVE RUN FROM THE POLICE OFFICER AND IT MAY BE -- THIS CAR TAKES OFF AT A HIGH RATE OF SPEED WHICH THE OFFICER CAN'T SAY EXACTLY WHAT THAT SPEED IS. I THINK THE CASES ARE EXTREMELY CLEAR THAT THAT IS NOT SUFFICIENT GROUNDS FOR A DETENTION AND THAT IS WHAT WAS HAPPENING HERE, WAS AN ATTEMPT TO MAKE A DETENTION WHICH RESULTED IN THE DISCARDING.

ON ADDITIONAL CASE I WOULD JUST GIVE THE COURT IS WILKINS, WHICH IS 186: CAL.APP.3D 804. THAT IS ALSO A FAIRLY RECENT CASE. ACTUALLY THAT'S A 1986 CASE. BUT, AGAIN THAT TALKS ABOUT AVOIDING THE POLICE OFFICER.

THE COURT: MS. KENFIELD?

MS. KENFIELD: YOUR HONOR, IN ADDITION TO THE MENIFEE CASE, WHICH IS A LINE THAT'S TOTALLY CONTRARY, THAT'S THE LINE OF CASE OF PATRICK, WHICH IS 135 CAL.APP.3D 290, WHICH REACHES A CONTRARY CONCLUSION TO MENIFEE.

THE COURT: I'M SORRY, CAL.APP.3D 290?

MS. KENFIELD: YES.

THE COURT: AND, THE NAME OF THE CASE IS WHAT?

MS. KENFIELD: PATRICK. I'M WELL AWARE OF THE WASHINGTON CASE AND I WOULD NOT SAY THE PEOPLE DO NOT HAVE A RIGHT TO AVOID POLICE OFFICERS. BUT, I THINK THE FACTS HERE ARE CLEARLY TANGIBLE THAN IN WASHINGTON.

IN THE WASHINGTON CASE, THE POLICE OFFICER GOT OUT OF THE CAR, WALKED TOWARDS THEM AND GREETED THE INDIVIDUALS. HERE, WHAT HAPPENS IS THE GROUP OF INDIVIDUALS GET OUT, LOOK UP, SEE THE CAR AS IT'S TURNING THE CORNER,

40 OR 50 YARDS AWAY AND RUN IN ALL DIRECTIONS. WHAT HAPPENS NEXT IS THEY LOSE SIGHT OF -- THE OFFICERS TOTALLY LOSE SIGHT OF ALL OF THESE INDIVIDUALS PRIOR TO THE TIME THEY EVEN GET OUT OF THE CAR. THEY PULL UP AND BY THE TIME THE OFFICER IS GETTING OUT OF THE CAR, HE'S LOST SIGHT OF THESE INDIVIDUALS WHICH WOULD MEAN THEY LOST SIGHT OF HIM. I THINK PETITIONER'S 1-B IS EXTREMELY IMPORTANT HERE BECAUSE IT SHOWS THAT THEY ARE JUST GUYS GUARDING COCAINE LIKE RIGHT AND LEFT NOT AS A RESULT OF THREAT OF ILLEGAL DETENTION, BUT BECAUSE THEY ARE RUNNING IN FEAR THAT THEY HAVE --

THE COURT: WHY DID YOU THINK THEY WERE THROWING AWAY COCAINE?

MS. KENFIELD: I DON'T KNOW. THEY DON'T WANT TO GET CAUGHT WITH IT.

THE COURT: BY WHOM?

MS. KENFIELD: BY THE POLICE.

THE COURT: OF COURSE.

MS. KENFIELD: BUT THE POLICE HAVEN'T DONE ANYTHING AT THE TIME THIS STUFF IS BEING THROWN AWAY TO LEAVE ANY REASONABLE PERSON TO BELIEVE THAT THEY ARE GOING TO BE DETAINED.

THE COURT: THEY HAVEN'T. THEY STOP THE CAR, ONE COP GETS OUT.

MS. KENFIELD: AS THAT COP IS GETTING OUT, HE CAN'T SEE ANYBODY THAT'S DOING ANYTHING.

THE COURT: THAT THE COURT CAN SEE.

MS. KENFIELD: THERE'S NO EVIDENCE AS TO WHAT THEY CAN SEE.

THE COURT: WAIT A MINUTE. DON'T WE HAVE IN EVIDENCE THAT THE COP GOT OUT AND WENT ON A TANGENT TO CUT THEM OFF? IS THAT WHAT HE SAID HE WAS TRYING TO DO?

MS. KENFIELD: YES, THAT'S WHAT HE SAID HE WAS TRYING TO DO.

THE COURT: DO YOU THINK HE WAS THE ONLY ONE WHO WOULD KNOW THAT?

MS. KENFIELD: WELL, YOUR HONOR, IF HE DOESN'T DO ANYTHING THAT THESE KIDS SEE, THEN WHAT THEY KNOW IS IMPORTANT BECAUSE IT'S NOT A STANDARD WHERE WE'RE LOOKING AT. WE'VE GOTTEN AWAY FROM THE STANDARD OF WHERE IT IS IN THE KIDS IN THE OFFICER'S MIND WERE HIS INTENTIONS.

THE COURT: GETTING UP TO THE POINT JUST BEFORE HE APPREHENDED THE MINOR. HE'S RUNNING TOWARDS THE MINOR.

MS. KENFIELD: THE MINOR IS RUNNING TOWARD HIM.

THE COURT: WHY IS HE RUNNING TOWARDS THE MINOR?

MS. KENFIELD: HE SAID HE WAS RUNNING TO DETAIN THE MINOR.

THE COURT: OF COURSE, THAT'S WHAT HE SAID.

MS. KENFIELD: BUT, HE DOESN'T DO ANYTHING TO COMMUNICATE THAT INTENTION TO THE MINOR.

THE COURT: EXCEPT RUN TOWARDS HIM.

MS. KENFIELD: BUT THE MINOR ISN'T SAYING -- THERE'S NO EVIDENCE THAT THE MINOR SAYS, "I THOUGHT HE WAS GOING TO DETAIN ME." HE HASN'T SAID HE STOPPED.

HE HASN'T DONE ANYTHING LIKE THAT AND AN OFFICER WALKING TOWARDS SOMEONE OR RUNNING TOWARDS SOMEONE DOES NOT BY ITSELF, MEAN THEY'RE GOING TO DETAIN THAT INDIVIDUAL.

THE COURT: GIVE ME SOME AUTHORITY, BECAUSE I READ THIS WASHINGTON CASE, TOO. IT'S BEEN A MILLION YEARS, BUT I'VE READ MENIFEE SOMETIME ALSO.

MS. KENFIELD: THE PATRICK CASE IS ONE.

THE COURT: YES, I READ THAT. I'LL READ IT AND FIND OUT AND I WILL ALSO READ THIS SUPREME COURT CASE THE ALDRIDGE THAT DEFENSE COUNSEL CITES. CERTAINLY, PATRICK DOESN'T PROPORT TO OVERRULE SUPREME COURT.

MS. KENFIELD: NO, BUT IT DOES – THE ALDRIDGE FACTS ARE SIGNIFICANT THAN THE FACTS IN BOTH PATRICK AND MENIFEE. IN PATRICK AND MENIFEE, THE COURT -- BOTH CASES CITE ALDRIDGE, BUT THEY TAKE IT IN TWO DIFFERENT DIRECTIONS.

MS. BRICKLEY: COULD I SAY JUST --

THE COURT: WAIT, I'LL GIVE YOU REBUTTAL.

MS. KENFIELD: BUT, I THINK THE FACTS IN THIS CASE DO NOT AMOUNT TO ILLEGAL DETENTION OR EVEN COUNSEL DOESN'T CALL IT ILLEGAL DETENTION. SHE CALLS IT A THREATENED ILLEGAL DETENTION AND I DON'T THINK THAT THE EVIDENCE SHOULD BE SUPPRESSED.

THE COURT: SUBMITTED?

MS. KENFIELD: YES.

THE COURT: REBUTTAL?

MS. BRICKLEY: I'M FAMILIAR WITH THAT PATRICK CASE AND YOU KNOW THE FACTS ARE SLIGHTLY DIFFERENT. THERE CLEARLY WAS A DIFFERENCE OF OPINION BETWEEN THE TWO DISTINCTIONS BETWEEN PATRICK AND MENIFEE IN THE OPINION OF WHETHER A THREATENED ILLEGAL DETENTION IS A THREAT OF AN ILLEGAL DETENTION AND IS IT SUFFICIENT TO SUPPRESS THE EVIDENCE. HOWEVER, I THINK THE FACT THAT THE CASES THAT HAVE FOLLOWED THE MENIFEE CASE – I DON'T SEE ANY PATRICK CASES THAT WAS FILED THE PATRICK REASON PEOPLE – BEING WASHINGTON BEING ONE OF THEM. ALSO WE JUST RECENTLY GOT A MEMO IN OUR OFFICE FROM SCOTT SPEAR, WHO DOES THE SEARCH AND SEIZURE WORK IN OUR OFFICE, WHICH CITES A NUMBER OF CASES WHICH SHOWS THAT ALL THE OTHER STATES AND THE FEDERAL SYSTEM HAS BEEN FOLLOWING THE MENIFEE REASONING. I DOUBT IF YOU'RE INTERESTED IN THOSE CASES – I'LL GIVE THEM TO YOU. I DON'T EVEN HAVE THE NEW YORK SUPERIOR CASES AND SOME OTHER CASES, BUT THE POINT IS THAT THAT TYPE OF REASONING HAS BEEN FILED. PATRICK IS THE ONLY CASE I'M AWARE OF THAT COULD EVEN BE INTERPRETED OF NOT FOLLOWING MENIFEE.

THE COURT: WAS PATRICK TAKEN UP? WAS IT TAKEN UP TO THE SUPREME COURT?

MS. BRICKLEY: IF IT WAS, THEY DIDN'T ACCEPT IT.

THE COURT: ALL RIGHT. WELL, I'LL DECLARE A RECESS AND TAKE A LOOK AT PATRICK AND ALDRIDGE AND SEE WHERE WE ARE. WE'LL TAKE A RECESS.

(RECESS TAKEN.)

THE COURT: BACK ON THE RECORD IN THE MATTER OF HODARI DULAN. ALL PARTIES AND ATTORNEYS HAVE APPEARED IN COURT.

ALL RIGHT. I WANT TO REROPE THE DISCUSSIONS ON THAT A LITTLE BIT. LET ME TELL YOU HOW MY THINKING IS. I REVIEWED SOME OF THESE CASES, ONES THAT YOU HAVE CITED AS WELL AS OTHER CASES WHICH ARE CITED IN THE CASES THAT YOU HAVE GIVEN TO ME. I AGREE WITH THE DISTRICT ATTORNEY'S VIEW THAT PATRICK SIMPLY REASONS A DIFFERENT CONCLUSION FROM WASHINGTON -- JUST DIVERSION REVIEWS FROM TWO COURTS OF APPEAL.

SO, THEN I WENT TO THE SUPREME COURT -- STATE SUPREME COURT TO DETERMINE WHAT THEIR VIEWS ARE. I ALSO NOTE THAT BOTH OF THESE CASES ARE CITED, AT LEAST ONE OF THE SUPREME COURT CASES ARE IN SUPPORT OF THEIR POSITION. I'M THINKING ABOUT THE ALDRIDGE CASE. THE SUPREME COURT SAYS THAT MORE THAN ONE OF THESE COURTROOM APPEAL CASES IS CITED IN SUPPORT OF SOME OF ONE OF THEIR POSITIONS OR THE OTHER.

NOW, WHAT I GET IN WASHINGTON IS NOT ONLY WAS THE CHASE BY THE POLICE A VIOLATION, BUT THEY DETERMINED THE QUALITY OF THE VIOLATION AND ON PAGE 1128, HE SAID SUCH AN EGREGIOUS VIOLATION OF THE FOURTH AMENDMENT SUPPORTS THE APPLICATION EXCLUSIONARY RULE AND SAID THE EVIDENCE IS TO BE SUPPRESSED. BUT, APPARENTLY AS I'M READING IT, IT'S BASED UPON THE EGREGIOUSNESS OF THE VIOLATION AND THAT WAS THAT THEY WERE CHASING THE DEFENDANT IN THAT CASE AND HE THROUGH THE STUFF DOWN. THEY WERE CHASING HIM PRIMARILY ON SIMPLY BECAUSE OF HIS RACE, BECAUSE HE WAS BLACK AND THEY WEREN'T SITTING STILL FOR THAT. I HAVE -- I DON'T FIND THAT HERE, BUT THE PRINCIPLE REASON WHY JUST BECAUSE HE WAS BLACK -- WHAT I'M GETTING FROM THE TESTIMONY HERE IS THAT THESE ARE WHAT WE CALL POLICE KIND OF STUFF.

I DON'T HAVE ANY DOUBT WITH THE FACT THAT THE CHASE WAS ILLEGAL. I DON'T HAVE ANY QUESTION FINDING THAT. THEY HAD NO RIGHT TO CHASE HIM AND THEY CERTAINLY HAD NO RIGHT TO DETAIN HIM. THIS MINOR -- OR WHAT I'M HAVING SOME DIFFICULTY IS I THINK IT'S IN ALDRIDGE AND ALDRIDGE PAGE 477, DEFINES WHAT CONSTITUTES A DETENTION AND IT SAYS THAT A DETENTION OCCURS QUOTES, "WHENEVER A POLICE OFFICER ACCOSTS AN INDIVIDUAL AND RESTRAINS HIS FREEDOM TO WALK AWAY," AND THEY CITED TERRY AGAINST OHIO FOR THAT PROPOSITION, "OR WHEN AN OFFICER STOPS AN INDIVIDUAL BECAUSE HE SUSPECTS THAT PERSON MAY BE PERSONALLY INVOLVED IN SOME CRIMINAL ACTIVITY" -- AND THOSE ARE THE TWO KINDS OF ACTIVITY WHICH ARE DEFINED BY THE STATE SUPREME COURT AS CONSTITUTING A DETENTION.

THERE'S NO QUESTION WITH WHAT WE HAVE HERE THAT THERE WAS NO ACTUAL DETENTION UNTIL AFTER THE MINOR OR THE INDIVIDUAL BEFORE ME, DISCARDED THE OBJECT. THE SUPREME COURT CERTAINLY IN ALDRIDGE, DOES NOT SPEAK TO A THREATENED DETENTION. THEY SPEAK TO AN ACTUAL DETENTION AND WHAT YOU'RE FLOWING FROM THAT.

TRUE, THERE ARE SOME COURT OF APPEAL CASES OF COURSE THAT INCLUDING WASHINGTON, THAT ARE SPEAKING TO A THREATENED DETENTION AND WHAT I DIDN'T DO -- LET ME BACK UP A MINUTE. PART OF THE ANALYSIS THAT I READ THROUGH THESE CASES IS IF THE FINDER OF FACT CAN MAKE A DETERMINATION THAT THE DISCARDING OF THE EVIDENCE WAS AN INTRINSIC PART OF THE ILLEGAL ACT THAT WAS ENGAGED IN BY THE POLICE AND I KEEP RUNNING UP AGAINST A STONE WALL IN THAT REGARD, EXCEPT IN THIS WASHINGTON CASE WHERE THERE'S SIMPLY TALK ABOUT EGREGIOUSNESS OF VIOLATIONS. THEY STILL DON'T TALK ABOUT WHAT'S BOTHERING ME.

LET ME -- YOU GUYS RESPOND TO THIS: FIRST OF ALL, THE POLICE HAD NO BUSINESS CHASING HIM AT ALL. THEY HAD NO RIGHT TO DETAIN, THEY HAD NO RIGHT TO CHASE HIM. IT APPEARS THAT THE MOTION IS MADE ON THE SUPPOSITION THAT IF THE MINOR HADN'T THROWN THE STUFF AWAY, WHEN THE POLICE CAUGHT UP WITH HIM THEY WOULD HAVE SEARCHED HIM ILLEGALLY AND WOULD HAVE OBTAINED THE ILLEGAL SUBSTANCE. THAT APPEARS TO BE THE BASIS UPON WHAT YOU'RE SAYING. WELL, YOU'RE SHAKING YOUR HEAD, BUT I CERTAINLY WILL GIVE YOU A CHANCE TO TALK. THAT'S THE WAY IT APPEARS TO ME, THAT SOMEBODY IS SAYING HE THREW THE STUFF AWAY. HE THREW AWAY ONLY BECAUSE HE REASONABLY BELIEVED THAT HE WAS GOING TO BE NOT ONLY CHASED, BUT HE WAS PHYSICALLY GOING TO BE DETAINED AND THEN HE WAS GOING TO BE SEARCHED AND THEN THEY WOULD HAVE FOUND THE STUFF. AND, SOMEHOW, THAT APPEARS TO BE WORKED OUT FROM DEFENSE'S POINT OF VIEW AS EITHER JUSTIFYING THE DISPOSITION OF THE OFFENSE OR IF NOT JUSTIFYING IT -- AT LEAST SAYING THIS IS A REASONABLE EXPECTATION TO BE DONE TO SUCH AN EXTENT THAT THE COURT OUGHT TO REPRESS ITS USE IN EVIDENCE IN ORDER TO DISSUADE THE POLICE FROM THIS ILLEGAL ACTIVITY OF CHASING PEOPLE WITHOUT CAUSE. WHAT BOTHERS ME IS IT DOESN'T APPEAR TO BE NECESSARY FOR THE MINOR TO THROW THE STUFF DOWN BECAUSE HE'S BEING ILLEGALLY CHASED BY A COP. HE CAN JUST KEEP THE STUFF IN HIS POCKET.

SUPPOSE THE COP DOES WHAT THE MINOR THINKS HE'S GOING TO DO. SUPPOSE HE CATCHES HIM, DETAINS HIM AND SEARCHED HIM BECAUSE HE RAN AWAY AND HE FINDS THE DOPE ON HIM. THAT WOULD CLEARLY BE A VIOLATION OF THE FOURTH AMENDMENT, THE RIGHT TO PRIVACY FROM MY POINT OF VIEW, SO THAT EVEN IF THE OFFICER FOUND IT ON HIS PERSON PURSUANT

TO THAT SEARCH ON A MOTION TO SUPPRESS, TO MY KNOWLEDGE, IT WOULD BE SUPPRESSED.

HOW COME IF THAT'S THE CASE, THEN WHY IS IT NECESSARY BEFORE THE MINOR IS DETAINED PHYSICALLY AND BEFORE HE IS SEARCHED, WHY IS IT NECESSARY FOR HIM TO THROW THE STUFF AWAY? AND, WHY IS IT THAT THE COURT OUGHT TO STAY BECAUSE THE MINOR DID THAT ON HIS OWN BECAUSE HE THOUGHT HE WAS GOING TO BE DETAINED AND SEARCHED BECAUSE HE DID IT ON HIS OWN, THAT THAT OUGHT TO ALSO BE SUPPRESSED? I HAVE GREAT DIFFICULTY REACHING THAT AND I DON'T SEE WHERE MY CASE THAT I'VE READ UP TO NOW DEALS WITH THAT AND I'D LIKE TO HEAR WHAT YOU HAVE TO SAY ABOUT IT AND IF NECESSARY, WE CAN PUT IT OVER AND YOU GUYS COULD DO SOME WORK -- WRITE MEMOS ON IT. YOU CAN GO FIRST, MS BRICKLEY.

MS. BRICKLEY: WELL, I THINK THE BALL IS IN MY COURT NOW. WELL, A NUMBER OF POINTS AND RESPONSES: I THINK I UNDERSTAND WHAT YOU'RE CONCERN IS IN RESPONSE TO THAT. FIRST OF ALL, AS FAR AS ALDRIDGE IS CONCERNED, IT'S TRUE THE FACTS -- IN FACT, I CITED ALDRIDGE REALLY FOR A DIFFERENT PROPOSITION WAS THAT THE PROPOSITION THAT SOMEBODY CAN AVOID A POLICE OFFICER WHICH YOU SEEM YOU'VE ALREADY RULED ON THAT.

THE COURT: THERE'S NO QUESTION IN MY MIND.

MS. BRICKLEY: THERE WASN'T A SITUATION WHERE THERE WAS A DROPPING OF SOMETHING IN ALDRIDGE, SO THEY NEVER REALLY ADDRESSED THAT QUESTION. SO, THE QUESTION IS WHETHER IN -- BASICALLY THE QUESTION IS WHETHER A THREAT OF AN ILLEGAL DETENTION, WHETHER IF SOMEBODY THROWS SOMETHING IN RESPONSE TO A THREAT OF AN ILLEGAL DETENTION,

WHETHER THAT EVIDENCE SHOULD BE SUPPRESSED AND I THINK THAT QUESTION HAS BEEN DIRECTLY ADDRESSED IN AT LEAST TWO CASES AND THOSE CASES WOULD BE MENIFEE FOR ONE, AND AGAIN YOU KNOW I WOULD HAVE TO AGREE WITH THE COURT THAT PATRICK JUST BASICALLY REACHED A DIFFERENT CONCLUSION THAN MENIFEE, BUT MENIFEE DIRECTLY ADDRESSED THAT QUESTION. IN FACT, I THINK IT PHRASES IT RIGHT IN THOSE WORDS AND SAID THAT IF THE DISCARDING IS IN RESPONSE TO A THREAT OF AN ILLEGAL DETENTION, THEN IT'S UNLAWFUL OR THE EVIDENCE SHOULD BE SUPPRESSED. AND, I BELIEVE WASHINGTON HOLDS THE SAME. I MEAN, IT DOES TALK WITH THE EGREGIOUSNESS OF THE CONDUCT BUT ITS BASIC HOLDING AND IT CITES MENIFEE ON PAGE 1125 AND PEOPLE VERSUS MENIFEE HELD THAT THE ACTION OF THE POLICE OFFICERS CONSTITUTE A THREAT OF AN UNLAWFUL DETENTION AND THEN IT GOES ON TO WHAT THEY CONCLUDED.

I THINK THAT'S EXACTLY WHAT HAPPENED IN WASHINGTON. THAT HAD TO BE WHAT THE COURT WAS HOLDING HERE EVEN IF THEY DIDN'T PUT IT IN THOSE EXACT WORDS, BECAUSE WHAT HAPPENED -- THEY FOUND AN ILLEGAL DETENTION AND THE DEFENDANT TOSSES THE STUFF WHILE RUNNING AWAY FROM THE OFFICERS, WHO WERE ABOUT TO ILLEGALLY DETAIN HIM. EXACT SAME SITUATION WE'RE DEALING WITH HERE. HAD THE POLICE STOPPED THIS PERSON AND SEARCHED HIM, IT WOULD HAVE BEEN UNLAWFUL. THE POLICE SHOULDN'T HAVE STOPPED AND SEARCHED HIM AND HAD THE POLICE COMPLIED WITH THE LAW, THEY NEVER WOULD HAVE FOUND THE STUFF. BUT THE COURT, NONETHELESS, GOES BACK TO THE FRUIT OF THE POISONOUS TREE TYPE RATIONAL -- YOU KNOW, THE OLD THEORY THAT IF THE OFFICERS DO SOMETHING THAT'S ILLEGAL OR IN THIS CASE ARE ABOUT TO DO, THEY'RE IN AN ACT OF DOING SOMETHING ILLEGALLY BY CHASING THESE KIDS IN AN ATTEMPT TO SEARCH THEM WHEN

THEY HAVEN'T DONE ANYTHING, OR ATTEMPT TO QUESTION THEM OR DETAIN THEM WHEN THEY HAVEN'T DONE ANYTHING, THEN ANYTHING THAT FLOWS FROM THAT, MUST BE SUPPRESSED. THAT'S THE TRUTH OF THE POISON.

THE COURT: LET ME COMMENT ON THAT BECAUSE THAT'S WHERE IT INTERFERES WITH MY VIEW OF GOOD REASONING THAT ANYTHING THAT FLOWS FROM THAT IS FRUIT OF THE POISONOUS TREE.

IF YOU COME UP TO MY FOUR-STORY APARTMENT, POINT YOUR GUN AT MY THREE YEAR OLD BABY AND SAY I'M ABOUT TO BLOW THIS BABY'S BRAINS OUT AND YOU STARTED PULLING THE TRIGGER AND IT HASN'T QUITE GONE OFF YET, AND I GRAB MY BABY AND THROW HER OVER THE BANISTER, HOPING LIKE HELL SHE'LL HIT ON A CANOPY OR SOMETHING OUTSIDE TO AVOID HAVING HER BRAINS BLOWN OUT, I THINK THAT IS A REAL AND UNNATURAL CONSEQUENCE OF WHAT YOU'VE JUST DONE. I MEAN, TRYING TO SAVE THE BABY, THAT IT'S AN ABSOLUTE NECESSARY THING FOR ME TO DO AND MERELY REASONABLE.

I DON'T SEE THROWING DOWN DOPE IN ORDER TO AVOID A COP FROM FINDING IT ON YOU AS BEING IN THE SAME CATEGORY AS THAT. NOW, WHAT I'M SAYING IS MAYBE NOT AS CLEARLY AS I OUGHT TO, THAT THERE ARE SOME THINGS THAT I THINK NATURALLY AND PROPERLY FLOW FROM CERTAIN KINDS OF ACTIONS. NOW, IT MAY NATURALLY BE THAT A MINOR WILL SAY I'M GOING TO THROW THIS STUFF BECAUSE I BELIEVE THAT IF THE COP COULDN'T CATCH ME WITH IT IN MY POCKET, THEN HE CAN'T PROVE THAT HE'S GUILTY. WE KNOW THAT IT'S FAIR TO REASON. WE DON'T SEE THAT AS CONSTITUTING NECESSARILY THE FRUIT OF THE POISONOUS TREE. THAT'S WHAT SOME PEOPLE DO AND WHAT SOME PEOPLE HAVE DONE IN MANY OF THESE CASES AND THAT'S WHAT'S HAPPENED AS YOU SAY IN MENIFEE

AND SOME OF THE OTHER CASES TOO AND THIS IS PART OF WHAT MAKES ME LEAN TOWARDS THE REASONING IN THE PATRICK CASE.

ANYHOW, IN THAT REGARD, HOW IS IT NECESSARILY THE FRUIT OF THE POISONOUS TREE JUST BECAUSE IT HAPPENED?

MS. BRICKLEY: WELL, I THINK WE'RE DEALING WITH A SITUATION WHERE YOU'RE ASSUMING THAT THE AVERAGE PERSON, ESPECIALLY AN AVERAGE JUVENILE, SORT OF KNOWS WHAT THE LAW IS. I THINK THAT IT'S PROBABLY FOR A LAY PERSON WOULD BE A COMMON ASSUMPTION THAT IF A POLICE OFFICER -- I MEAN IT'S THE SAME THING IF SOMEBODY IS ABOUT TO BE STOPPED FOR A TRAFFIC VIOLATION AND THEY HAVE DRUGS IN THEIR CAR, THEY'RE MOST LIKELY GOING TO HIDE THOSE DRUGS, EVEN THOUGH JUST STOPPING THIS PERSON FOR A TRAFFIC VIOLATION, THE COP CAN'T JUST GO SEARCHING THAT CAR.

THE COURT: NOT LEGALLY, WE KNOW THAT.

MS. BRICKLEY: YES, WE KNOW THAT. BUT, I THINK THE LAY PERSON DOES NOT KNOW THE LAW AND FROM WATCHING T.V. AND UNFORTUNATELY FROM REALITY OF WHAT HAPPENS SOMETIMES OUT ON THE STREETS, THAT THAT'S VERY LIKELY WHAT IS GOING TO HAPPEN IN RESPONSE TO THAT AND I THINK IT'S PROBABLY NOT AT ALL UNLIKELY THAT IF SOMEBODY IS STOPPED, ESPECIALLY WHEN AN OFFICER IS CHASING SOMEBODY, THAT THEY'RE GOING TO THINK IF HE CATCHES ME HE'S GOING TO LOOK IN MY POCKETS AND HE'S GOING TO FIND WHAT'S HERE, BECAUSE THAT IS WHAT THEY ARE ASSUMING. THEY DON'T THINK.

THE COURT: I DON'T QUARREL WITH YOU THAT THAT'S PROBABLY WHAT A LOT OF PEOPLE THINK. NOW, IS THAT THE

DETERMINING FACTOR THOUGH? IS THE COURT SUPPOSED TO SAY BECAUSE THAT'S THE WAY PEOPLE THINK, THEN WHAT THEY DO BASED UPON THAT THINKING, IS THE NATURAL FRUIT OF A POISONOUS TREE AND WHATEVER THEY DO OUGHT TO BE CONDONED? NO WAY, SUPPRESS IT?

MS. BRICKLEY: I THINK SO, BECAUSE THE STANDARD WHETHER THIS PERSON REACTED AND WHETHER EVEN A REASONABLE PERSON WOULD REACT TO THIS UNTHREAT OF AN UNLAWFUL DETENTION IN THAT MANNER.

THE COURT: WELL, OKAY. YOU'LL INTRODUCE SOMETHING ELSE WHETHER HE'S ACTING AS A REASONABLE PERSON WOULD. I ALWAYS LIKE TO THINK I'M REASONABLE. I KNOW I'VE HAD SPECIAL TRAINING OF THE LAW, YOU AND I ALSO KNOW THAT CERTAIN KINDS OF SEARCHES WOULD BE ILLEGAL. WHY DO YOU HAVE TO GO TO LAW SCHOOL IN ORDER TO DETERMINE THAT POLICEMEN DON'T HAVE THE RIGHT TO SEARCH YOU WITHOUT PROBABLE CAUSE OF SOME KIND OR THE OTHER?

MS. BRICKLEY: WELL, AGAIN, I THINK THAT IF AN OFFICER IS CHASING YOU, I THINK THAT PROBABLY ESPECIALLY IF YOU HAVE DOPE IN YOUR POCKET, YOUR ASSUMPTION IS THIS OFFICER IS CHASING YOU BECAUSE HE WANTS TO GO THROUGH YOUR POCKET AND -

THE COURT: LET HIM DO IT AND THEN I WILL GET ME A GOOD LAWYER FROM THE PUBLIC DEFENDER'S OFFICE AND THEY WILL SAY YOU'VE GOT IT MADE, SON, SO LONG AS THE COP DOESN'T COME UP AND LIE ABOUT WHAT HAPPENED, I'LL GET YOU OFF. SO, WHY NOT JUST LET THE COP CATCH YOU, GO THROUGH YOUR POCKETS AND START LAUGHING? SAY, I GOT YOU NOW YOU DUMB COP. YOU NEED BUSINESS DOING THIS. NOW MY LAWYER WILL GET ME OFF.

MS. BRICKLEY: I THINK THAT IS A VERY RATIONAL THOUGHT OUT REACTION, BUT I DON'T THINK THAT'S THE NATURAL REACTION IN A SITUATION LIKE THIS WHERE SOMEBODY IS CHASING AFTER YOU. I THINK THAT THE NATURAL REACTION IS TO DO EXACTLY WHAT'S BEEN TESTIFIED TO HAPPEN HERE, WHICH IS TO TRY TO --

THE COURT: LET'S TAKE IT TO A FURTHER EXTREME. SOME OF YOU GET SCARED WHEN FOLKS ARE CHASING US WITH GUNS ON THEIR PERSON. SUPPOSE THE KID TURNS AROUND AND BLOWS THE COP AWAY AND SAYS, LOOK IT MAN, I GOT SCARED THAT HE WAS GOING TO CATCH ME AND I THOUGHT HE WAS GOING TO HURT ME BECAUSE POLICEMEN DON'T LIKE PEOPLE RUNNING FROM THEM SO I TURNED AROUND, HE HAD A GUN, YOU DON'T KNOW WHAT HE WAS GOING TO DO WITH IT SO I SHOT HIM BETWEEN THE EYES.

DO YOU THINK THAT SHOULD BE CONDONED BY THE COURT BECAUSE THAT'S A NATURAL REACTION THAT SOME PEOPLE HAVE WHEN THEY'RE BEING CHASED WRONGFULLY?

MS. BRICKLEY: ALL I THINK WE'RE TALKING ABOUT TWO DIFFERENT SITUATIONS. WE'RE TALKING ABOUT SUPPRESSION AND THAT'S WHETHER SOMEBODY DID SOMETHING RIGHT OR WRONG.

THE COURT: YOU WANT TO SUPPRESS IT RIGHT OR WRONG, WHILE HE WAS BEING ILLEGALLY CHASED?

MS. BRICKLEY: NO, I DON'T THINK THAT IS THE SAME SITUATION BECAUSE I DON'T THINK THAT IS A NATURAL AND REASONABLE REACTION.

THE COURT: YOU NEVER GREW UP IN MY NEIGHBORHOOD. WE DON'T LIKE BEING CHASED BY FOLKS WITH GUNS.

MS. BRICKLEY: WELL, I JUST DON'T THINK THAT THAT'S AT THE SAME LEVEL. I DON'T THINK THAT IS AS NATURAL AND REASONABLE AS A SITUATION IN THIS SITUATION, WHO IS BEING CHASED BY A POLICE OFFICER WHO HAD DOPE IN THEIR POCKET AND I THINK THAT IS A VERY NATURAL REACTION. I SORT OF DON'T WANT TO GET HUNG UP ON THAT TOO MUCH, BUT I THINK REASONABLY REALLY THE ANSWER IS SIMPLY IN RESPONSE TO THE ILLEGAL DETENTION AND THAT'S WHERE --

THE COURT: THAT'S WHY I USED THAT RIDICULOUS EXAMPLE. IT WAS A RESPONSE TO A THREATENED ILLEGAL DETENTION.

NOW, IF YOUR POSITION IS SOME RESPONSES TO THREATENED ILLEGAL DETENTION, IT OUGHT TO BE SUPPRESSED. BUT, SOME RESPONSES OUGHT NOT BE SUPPRESSED. WHERE DO YOU DRAW THE LINE? WHERE SHOULD THE COURT DRAW THE LINE?

MS. BRICKLEY: WELL, YOU KNOW THAT'S A SITUATION WHERE I WOULD HAVE TO THINK OUT FURTHER. THAT, FORTUNATELY IS NOT BEFORE THE COURT RIGHT NOW.

THE COURT: YES, IT IS. IT'S NOT THE EXAMPLE, BUT THE ISSUE IS BEFORE THE COURT.

MS. BRICKLEY: RIGHT. I MEAN AS FAR AS THE GUN SITUATION AND LET ME SEE IN THE GUN SITUATION, YOU'RE SAYING THAT THE PERSON WHO IS CHASING HIM WAS A POLICE OFFICER BUT HE'S NOT DRESSED AS A POLICE OFFICER?

THE COURT: HE'S DRESSED LIKE A COP. LOOKS LIKE A COP.

MS. BRICKLEY: AND, HE'S CHASING WITH A GUN?

THE COURT: HE'S GOT HIS GUN. HE'S GOT HIS FULL UNIFORM ON.

MS. BRICKLEY: AND, THIS PERSON IS AFRAID HE'S GOING TO GET SHOT SO HE TURNS AROUND.

THE COURT: THE PERSON HAS SOME DOPE IN HIS POCKET, BUT HE ALSO KNOWS SOME OF THESE KIDS, IF YOU RUN FROM THESE POLICEMEN THEN THEY BEAT YOU UP AND HE SAYS I DON'T LIKE TO GET BEAT UP.

MS. BRICKLEY: THAT, I THINK, IS TOTALLY DIFFERENT. I DON'T THINK THAT IS A REASONABLE REACTION THAT A COP IS GOING TO SHOOT YOU OR BEAT YOU UP AND I DON'T THINK EVEN IF IT WAS TRUE THAT A COP IS GOING TO BEAT YOU UP, I DON'T THINK IT IS ALL REASONABLE TO SHOOT THAT PERSON BECAUSE YOU MAY BE GOING TO GET BEAT UP. I MEAN, WE'RE TALKING ABOUT TWO DIFFERENT THINGS ABOUT BEATING SOMEONE UP AND SHOOTING THEM. I DON'T THINK THAT IS AT ALL A REASONABLE REACTION TO THAT SITUATION.

THE COURT: ALL RIGHT. LET ME MAKE IT A CLEAN ONE THEN. HE REALLY THINKS THAT THE COP WILL SHOOT HIM. HE SAYS HE'S CHASING ME AND WE'VE GOT CRAZY COPS OUT THERE. THEY'VE GOT THESE GUNS AND NO JUDGMENT TO WHETHER YOU RUN AWAY FROM THEM SOME WILL SHOOT YOU AND THEY'LL COME INTO A COURT OF LAW AND SAY HE THREATENED ME IN SOME KIND OF WAY. THEY HAVE A THROW AWAY GUN. THEY SAID HE HAD THIS ON HIM SO I SAY I'M SCARED OF WHAT'S GOING TO HAPPEN, SO I SHOT HIM.

MS. BRICKLEY: I STILL DON'T THINK IT'S REASONABLE RESPONSES WHERE I DO THINK HERE IT WOULD BE A REASONABLE RESPONSE TO THINK THAT IF A POLICE OFFICER, YOU KNOW A DRUG AREA, YOU'VE GOT DRUGS IN YOUR POCKETS AND A POLICE OFFICER IS CHASING YOU. I THINK IT'S

NUMBER ONE, UNREASONABLE TO ASSUME HE'S CHASING YOU BECAUSE HE THINKS YOU HAVE DRUGS ON YOU AND NUMBER TWO, TO ASSUME HE'S CHASING YOU SO HE CAN FIND OUT IF YOU HAVE DRUGS ON YOU OR NOT.

THE COURT: YOU'VE BEEN UNDULY QUIET. WHAT'S ON YOUR MIND?

MS. KENFIELD: YOU'VE ALWAYS TOLD ME NOT TO INTERRUPT. I DID A LITTLE BIT OF RESEARCH AND I CAME UP WITH ONE ADDITIONAL CASE THAT THE COURT SAYS -- WELL, LET ME GIVE IT TO YOU, THAT'S THE HOLLOWAY CASE AT 176; CAL.APP.3D; 150. IT TALKS ABOUT MENIFEE AND IT TALKS ABOUT PATRICK AND THE FACTS IN THIS CASE IN LIGHT OF THE COURT'S RULING THAT THE CHASE WAS ILLEGAL, BASICALLY A POLICE OFFICER WALKS UP, SOMEBODY TURNS AROUND AND LOOKS SURPRISED, THE OFFICER WHO HAD BEEN LOOKING DOWN AT HIS OPEN HAND, CLOSED HIS FIST AND MOVED HIS ARM -- YOU KNOW, AS IF HE WAS GOING TO THROW SOMETHING, AT WHICH POINT THE OFFICER GRABBED IT AND OPENED HIS HAND AND THE COURT THERE DISTINGUISHED BETWEEN ILLEGAL DETENTION AND A THREATENED ILLEGAL SEARCH. I THINK THE FACT THAT THERE WAS A POSSIBLE ILLEGAL DETENTION DOES NOT NECESSARILY MEAN THERE'S GOING TO BE A THREATENED ILLEGAL SEARCH. AND, IF THERE IS A CAUSAL CONNECTION, THE COURT STATES THAT THE CHALLENGING PARTY MUST DEMONSTRATE AN EXPLOITIVENESS BETWEEN THE CHALLENGED EVIDENCE AND THE PRIMARY ILLEGALITY.

THE COURT: I'M SORRY, READ THAT AGAIN?

MS. KENFIELD: THE CHALLENGING PARTY MUST DEMONSTRATE AN EXPLOITIVENESS BETWEEN THE CHALLENGED EVIDENCE AND THE PRIMARY ILLEGALITY.

THE COURT: WHAT DO THEY MEAN BY THAT?

MS. KENFIELD: I THINK WHAT THEY MEAN IS THAT THE PERSON WHO'S CHALLENGING THE EVIDENCE, MUST SHOW THAT THERE'S SOME REASON TO SAY BECAUSE I WAS GOING TO BE ILLEGALLY DETAINED, BECAUSE I THOUGHT I WAS GOING TO BE ILLEGALLY DETAINED OR I WAS ILLEGALLY DETAINED THAT THERE WOULD BE THROUGH SOME BREAKING INEVITABILITY OF AN ILLEGAL SEARCH. AND, THE COURT GOES ON TO TALK ABOUT, IT IS ONLY WHEN A PERSON HAS REASONABLE CAUSE TO BELIEVE THAT HIS PRIVATE POSSESSIONS WILL INEVITABILITY BE EXPOSED TO VIEW BY IMPROPER POLICE PRACTICE THAT THEIR ATTEMPTED ABANDONMENT WOULD BE DEEMED THE FRUIT OF THAT CONVENT.

SO YOU WOULD, WHAT THE COURT IN HOLLOWAY SEEMS TO SAY THAT YOU HAVE TO DEMONSTRATE THAT THERE IS -- THAT THE PERSON HAS REASONABLE CAUSE TO BELIEVE THAT THERE IS SOME INEVITABILITY ABOUT A DETENTION AND THEN INEVITABILITY A SEARCH AND THAT THE EVIDENCE WILL BE SUPPRESSED. AND, THE COURT COMMENTS THAT THE HOLLOWAY CASE, THE INDIVIDUALS OWN AWARENESS OF THE ELICIT NATURE OF THE ACTIVITY THAT PROMPTED HIS EFFORTS TO DESTROY THE FRUITS OR DESTROY THE PROOF. THAT HE KNEW HE HAD SOMETHING ILLEGAL AND HE WANTED TO GET RID OF IT.

THERE WAS NO THREAT OF AN ILLEGAL SEARCH JUST BECAUSE THERE WAS THREAT OF AN ILLEGAL DETENTION. AND, I THINK WASHINGTON ALSO IS NOT INCONSISTENT WITH THAT BECAUSE IF I RECALL IN WASHINGTON, THERE WAS A CHASE OF SOME FOUR OR FIVE BLOCKS.

THE COURT: I THINK IT WAS ABOUT TWO MINUTES.

MS. KENFIELD: AND, WHAT WE HAVE HERE, IS THE POLICE OFFICER GET AROUND AND RUN TO CUT OFF THE ESCAPE AND THIS MINOR IS LOOKING BEHIND HIM, HE DOESN'T SEE ANYTHING AND THEN HE LOOKS UP AND SEES THE POLICE. I DON'T THINK THAT IS A SITUATION WHERE IN WASHINGTON THE COURT SEEMED TO BE CONSISTENT WITH HOLLOWAY, WHEREIN THIS TWO MINUTE EXTENDED CHASE OVER A GREAT PERIOD OF TIME WOULD GIVE SOMEBODY AN INEVITABLE REASON.

THE COURT: ALL RIGHT. AND, THEY USED THIS WORD INEVITABILITY QUOTE, "OF AN ILLEGAL SEARCH," IS THAT THE PHRASE THAT'S USED IN HOLLOWAY?

MS. KENFIELD: YES, ON PAGE 156.

THE COURT: NOW, YOU THEN, I GATHER YOUR ARGUMENT IS THAT THERE HAS TO BE AN INEVITABILITY OF AN ILLEGAL SEARCH VERSUS MS. BRICKLEY'S ARGUMENT WHICH IS THAT SIMPLY IF THE REACTION TO THE ILLEGAL CHASE IS A REASONABLE REACTION, YOU SAY NO, ITS GOT TO BE MORE THAN THAT. ITS GOT TO SHOW THAT INEVITABILITY THAT WOULD FOLLOW AN ILLEGAL SEARCH.

MS. KENFIELD: THERE HAS TO BE SOME EVIDENCE OR SOME FACTS WHEREBY THE INDIVIDUAL COULD REASONABLY SAY THAT A SEARCH INEVITABLE RATHER THAN JUST A, HI, HOW ARE YOU, WHAT ARE YOU DOING OUT HERE AT 10:00 O'CLOCK AT NIGHT -- BECAUSE THERE ARE DETENTIONS WITHOUT SEARCHES. THERE ARE FIELD CONTACTS. THERE ARE A NUMBER OF THINGS. THESE OFFICERS DIDN'T SAY THEY WANTED TO SEARCH THESE INDIVIDUALS. THEY WANTED TO FIND OUT WHO THEY WERE AND WHAT THEY WERE DOING BECAUSE THEY THOUGHT THEY WERE INVOLVED IN DOPE.

THE COURT: ACTUALLY, MY LOGIC REJECTS THE RULES OF OTHERS THAT INSIST I HAVE TO FOLLOW, BUT MY LOGIC REJECTS EVEN THAT ARGUMENT BECAUSE I SEE AN INTERVENING ACT, NAMELY THE DISCARDING OF THE CONTRABAND BY SOMEBODY. I DON'T SEE, EVEN IF IT'S INEVITABLE IF THERE WAS AN ILLEGAL SEARCH, I SEE ABSOLUTELY NO REASON WHY SOMEBODY HAS TO DISCARD THE CONTRABAND. JUST KEEP IT AND THEN LET THEM GO ON AND SEARCH ILLEGALLY AND THEN GO THROUGH THE SAME ARGUMENT THAT I WENT THROUGH BEFORE, THAT I SEE AS AN INTERVENING ACT ON THE PART OF THE PERSON. WOULD THE COURTS DEAL WITH THAT IN ANY OF THE CASES?

MS. BRICKLEY: WELL, I JUST WAS LOOKING AT PEOPLE VERSUS WASHINGTON ON PAGE 1126 AND UNDER ROMAN NUMERAL THREE, THERE'S A WHOLE DICUSSION OF REALLY THAT ISSUE. THE TRUTH OF THE POISONOUS TREE AND THEY CITE STANDARDS THAT IS WHETHER GRANTING ESTABLISHMENT OF THE PRIMARY ILLEGALITY, THE EVIDENCE TO WHICH, IN FACT, AN OBJECTION IS MADE HAS BEEN COME AT BY EXPLOITATION OF THAT ILLEGALITY OR INSTEAD BY MEANS SUFFICIENTLY DISTINGUISHABLE TO BE OF THE PRIMARY ILLEGALITY. AND, THEN THEY DISCUSS --

THE COURT: LET'S NOT GO BEYOND THAT. LET'S DEAL WITH THAT PHRASE, EXPLOITATION OF THAT ILLEGALITY.

NOW, I HAVE TO ASSUME OR I DO ASSUME, THAT THEY MEAN THE EXPLOITATION BY THE POLICE OF THAT OF THEIR OWN ILLEGALITY.

MS. BRICKLEY: ACTUALLY, I DON'T -- I'M NOT REALLY SURE.

THE COURT: IT WOULDN'T MAKE ANY SENSE OTHERWISE. IT APPEARS TO ME --

MS. BRICKLEY: BUT, I THINK YOU HAVE TO LOOK THAT IN THE DISCUSSION AND TIE IT IN WITH THE FACT OF THIS CASE WHICH MEANS THE HE RUNS AND STASHES THE STUFF AS THE POLICE OFFICER IS CHASING HIM AND THERE THEY FIND THAT THAT DOES FALL WITHIN THAT STANDARD.

THE COURT: BUT, THE ACT WHICH YOU OBJECT TO, WHICH FLOWS FROM THE ILLEGALITY IS THE DISPOSAL -- THE DISCARDING OF THE CONTRABAND.

NOW, THE COPS DIDN'T DISCARD THE CONTRABAND, SO HOW CAN IT BE SAID THAT THE COPS EXPLOITED THEIR OWN ILLEGALITY AND OF COURSE, YOU DON'T CALL IT EXPLOITING IF THE MINOR THROWS IT AWAY.

MS. BRICKLEY: I THINK WHAT THAT MEANS IS BASICALLY WHETHER IT WAS THE RULE OF THAT ILLEGALITY OR WHETHER SOMETHING THERE WAS SOMETHING THAT INTERVENES OR BECAME MADE SUFFICIENTLY IN TIME OR WHATEVER WAY SEPARATE FROM THAT. AND, THEN THEY GO ON TO SAY YOU KNOW, UPON THE FACTORS OF THE FACTS BEFORE US WHICH CANNOT SAY ABANDON. TWO MINUTES HE LAPSED HERE IT WAS LESS BETWEEN SEIZURE AND ABANDONMENT AND THEY CONSIDER SEIZURE AND THEY DISCUSSED THAT BEFORE AS BEING THE CHASING THAT THEY CONSIDER A SEIZURE. THERE WERE NO INTERVENING CIRCUMSTANCES AND IN DEED, BECAUSE THE DEFENDANT DISCARDED THE BINDLE DURING THE CHASE THE ABANDONMENT OCCURRED WHILE HE WAS ILLEGALLY SEIZED AND THIS WOULD BE INTERVENING CIRCUMSTANCES, SO I THINK THAT'S IDENTICAL TO THE SITUATION.

ANOTHER THOUGHT THAT CAME TO MIND IS ANOTHER SITUATION WHICH WE CALL, SEEM TO HAVE ACCEPTED I THINK IS SOMEWHAT SIMILAR YOU KNOW, IT'S ANOTHER FRUIT SITUATION. I MEAN, WE'VE ALL HEARD CASES -- LET'S TAKE AN EXAMPLE OF A CAR STOPPED AND LET'S ASSUME ITS

STOPPED ILLEGALLY. THERE'S REALLY NO JUSTIFICATION FOR STOPPING THIS CAR AND AS THE OFFICERS ARE WALKING ABOUT THERE ARE SOME FURTIVE MOMENTS AND BECAUSE OF THE FURTIVE MOMENTS AND THEN MAYBE THE PERSON DOES SOMETHING IN ADDITION TO SCARE THE OFFICER, THEN THE OFFICER GOES IN AND SEARCHES THE CAR AND FINDS HIM WITH CONTRABAND. I THINK THAT, YOU KNOW, IF IT HAD NOT BEEN ILLEGAL DETENTION, THE FURTIVE MOMENTS AND IF THE INDIVIDUAL IN THE CAR DOES SOMETHING THAT WOULD MAYBE MAKE THE OFFICER FEEL HE'S IN DANGER, THERE'S NO QUESTION THAT THOSE FACTS HAVE NOT BEEN FOR ILLEGAL DETENTION WOULD JUSTIFY GOING IN AND SEARCHING THAT CAR. BUT, ONCE THE COURT RULES THAT THERE WAS NO REASON TO STOP THAT CAR, WE HAVE ALL ACCEPTED AND IT IS THE LAW THAT WHAT FOLLOWED FROM THERE, IS THE FRUIT OF THAT ILLEGAL DETENTION.

THE COURT: I'M NOT SURE THAT THE CASES THAT I SAY I READ SAY AS A MATTER OF FACT PARTICULARLY WASHINGTON, CLEARLY DOESN'T SAY THAT ANYTHING THAT FOLLOWS FROM AN ILLEGAL DETENTION IS NECESSARILY SUPPRESSIBLE. AS A MATTER OF FACT, THEY SPECIFICALLY SAY IT'S NOT SOMEWHERE IN HERE -- OF COURSE WE GET BACK TO THAT EARLIER QUESTION WHERE I RAISED THE QUESTION INSTEAD OF THROWING AWAY SOME DOPE AND KILLING THE COP BETWEEN THE EYES, WE'RE TALKING ABOUT RELATIONS OF REACTIONS TOTAL ILLEGALITY AND I THINK IT'S ON PAGE 1128 HERE SOMEWHERE. IT'S ON PAGE 1127. IN TALKING ABOUT -- I'M QUOTING FROM THE LAST THAT THE COURT IN WASHINGTON SAYS THAT THE EXCLUSIONARY RULE IS INEVITABLY INTERPRETED TO PROSCRIBE THE USE OF AN ILLEGALLY SEIZED EVIDENCE IN ALL PROCEEDINGS, AND THEY GO ON TO SAY THAT IT IS NEITHER INTENDED NOR ABLE TO CURE THE INVASION OF THE DEFENDANT'S RIGHTS WHICH HE HAS ALREADY SUFFERED.

SO, HE HAS ALREADY BEEN DETAINED. HE CITES UNITED STATES AGAINST LEON FOR THAT. THEN THEY GO ON TO SAY -- RATHER THE RULE OPERATES AS A JUDICIALLY RELATED REMEDY DESIGNED TO SAFEGUARD THE FOURTH AMENDMENT RIGHTS GENERALLY THROUGH ITS DETERRENT EFFECT, RATHER THAN A PERSONAL CONSTITUTIONAL RIGHT OF THE PARTY APPROACHED.

I THINK THEY'RE MAKING IT VERY CLEAR THAT IT DOESN'T RETUNE THAT IF THERE IS AN ILLEGAL CHASE, AS IN THIS CASE, THAT ALL EVIDENCE THAT RESULTS FROM THAT HAS TO BE SUPPRESSED.

MS. BRICKLEY: MY UNDERSTANDING OF THAT WOULD BE, I THINK THEY'RE REFERRING IN ALL PROCEEDINGS. THAT DOESN'T APPLY, FOR EXAMPLE, ALL CIVIL PROCEEDINGS TOO. MY UNDERSTANDING IS THE POINT THEY'RE MAKING IS THE PURPOSE OF IT IS TO DETER IMPROPER POLICE CONDUCT, NOT TO GIVE A REMEDY.

THE PURPOSE IS NOT TO LET PEOPLE OUT, MAYBE THEY'VE DONE SOMETHING WRONG. THE PURPOSE IS TO DETER UNLAWFUL POLICE CONDUCT AND I AGREE WITH THAT AND I THINK THAT'S ALL THE MORE REASON WHY IN THIS TYPE OF SITUATION WHERE YOU KNOW EVERYBODY OR YOUR HONOR, AT LEAST THERE HAS BEEN ILLEGAL POLICE CONDUCT AND THAT THE EVIDENCE SHOULD BE SUPPRESSED.

IF THAT'S THE REASON FOR IT AND I THINK THAT'S THE REASON AND IF THIS IS ALL ABOUT DETERRING UNLAWFUL POLICE CONDUCT, IF IT'S BEEN ONCE, IT'S BEEN ESTABLISHED, IF WE'RE GOING TO DEFER IT THEN THE REMEDY IS TO SUPPRESS THE EVIDENCE.

THE COURT: THEN WHAT ABOUT PAGE 1127, BROWN AGAINST ILLINOIS? ANOTHER UNITED STATES SUPREME COURT

CASE AS TO WHETHER THE DISCARDING OF THE CONTRABAND WAS THE PRODUCT OF A FREE WILL. WHY EVEN GET INVOLVED IN THAT IF WE FOLLOW YOUR REASONING THAT ANY TIME THERE'S AN ILLEGAL CHASE AND SOMEBODY THROWS SOMETHING DOWN IN ORDER NOT TO GET CAUGHT WITH IT AND IT AUTOMATICALLY SHOULD BE SUPPRESSED? HERE THEY'RE SAYING THAT NO SINGLE FACT IS DISPOSITIVE(SIC) TO WHETHER OR NOT THIS IS AN ACT OF FREE WILL OR NOT AND THE COURT PROCEEDED TO SEVERAL FACTORS NOW FOR DETERMINING A CONTINUATION OF A FACT TO AN ILLEGAL CONDUCT AND THEY CITE THREE THINGS THAT YOU LOOK FOR.

IF I FOLLOW YOUR REASON, YOU DON'T HAVE TO LOOK FOR ANYTHING EXCEPT WHERE A COP IS WRONG AND IS CHASING HIM AND HE THROWS IT DOWN BECAUSE HE WAS SCARED HE WAS GOING TO GET CAUGHT WITH IT SO I SHOULD SUPPRESS IT.

MS. BRICKLEY: BUT THE FACT OF THE MATTER IN THIS CASE WHERE WE HAVE A SITUATION IDENTICAL HERE WHERE AN OFFICER IS CHASING SOMEBODY, UNLAWFULLY CHASING SOMEBODY, AND HE THROWS THE OBJECT DOWN AND THE COURT DID SUPPRESS IT.

THE COURT: YES. WE'RE GOING IN CIRCLES NOW.

MS. BRICKLEY: IF THE COURT IS CONCERNED OF THAT, I KNOW AS I MENTION I RECENTLY GOT A MEMO AND THERE ARE A NUMBER OF FEDERAL AND OUT OF STATE CASES WHICH HAVE SPECIFICALLY ADDRESSED THIS ISSUE AND HAVE FOLLOWED THE MENIFEE RATIONAL. IF THE COURT WANTS IT, I WOULD BE HAPPY TO DO A LITTLE MORE RESEARCH WITH THE EXCEPTION OF THAT PATRICK CASE. THE CASES HAVE CONSISTENTLY HELD THAT WHERE THERE IS A THREAT OF AN ILLEGAL DETENTION AND THE THROWING IS IN RESPONSE TO THAT, THE EVIDENCE SHOULD

BE SUPPRESSED. AND, I WOULD BE HAPPY TO DO SOME MORE RESEARCH ON IT.

THE COURT: I WOULD WELCOME POINTS AND AUTHORITIES. LET ME MAKE SURE YOU UNDERSTAND MY PRINCIPAL CONCERN. I'M NOT CONCERNED WITH THE ILLEGALITY OF THE CHASE ON THESE FACTS. I THINK THIS WAS CLEARLY ILLEGAL. THE COPS HAD NO REASONABLE BASIS FOR DOING WHAT THEY DID IN CHASING HIM.

MY CONCERN IS, AM I REQUIRED TO MAKE A FINDING THAT BECAUSE THE POLICE ACTED ILLEGALLY IN CHASING, AM I REQUIRED TO FIND THAT ANYTHING THAT WAS DISPOSED OF WHEN I BELIEVE IT WAS DISPOSED OF BY THE PERSON TO PREVENT THE OFFICER FROM FINDING IT ON HIS PERSON, AM I REQUIRED TO DETERMINE THAT THAT'S SUPPRESSIBLE?

MS. BRICKLEY: OKAY.

THE COURT: ALSO, WHAT I WANT YOU TO SEE IF YOU CAN FIND IF THERE ARE SOME CASES THAT DEALT WITH HAVING A REASON HUNG UP WITH THESE CASES EVEN THE ONES THAT FIND THAT IT SHOULD BE SUPPRESSED. I DON'T FIND THAT THEY CLEARLY STATE WHAT I AM TO LOOK FOR IN ORDER FOR ME TO FIND THAT THE MINOR WAS GOING TO BE SEARCHED. I'LL GO EVEN FURTHER THAN THAT.

I DON'T UNDERSTAND THAT REASONING THAT SAYS EVEN IF YOU KNOW A HUNDRED PERCENT THIS COP IS GOING TO SEARCH ME ILLEGALLY, HOW DOES THAT JUSTIFY YOU IN DISCARDING CONTRABAND AND THEN GETTING THE BENEFIT OF HAVING THAT SUPPRESSED. I DON'T UNDERSTAND THE REASONING THAT SAYS THAT. WHERE AS, IF YOU DON'T DISCARD IT AND THE POLICE FIND IT AS A RESULT OF AN ILLEGAL SEARCH, IT WILL AUTOMATICALLY BE SUPPRESSED. JUST LOGIC TELL ME THERE'S NO JUSTIFICATION FOR SAYING IF YOU

THROW IT AWAY JUST BEFORE THE COP GETS TO YOU WHEN HE'S CHASING YOU, IT WILL BE SUPPRESSED. IT SHOULD BE SUPPRESSED. IF YOU LEAVE IT IN YOUR POCKET AND HE SEARCHED YOU ILLEGALLY, IT'S GUARANTEED TO BE SUPPRESSED. NO QUESTION ABOUT IT.

THOSE ARE THE PRINCIPAL ISSUES I AM CONCERNED WITH AND ANYTHING THAT YOU TWO HAVE THAT YOU COULD FIND ON THAT, I WOULD BE GRATEFUL. I AM INCLINED AT THIS STAGE TO DENY YOUR MOTION. I GUESS IT'S COME THROUGH BY NOW.

MS. BRICKLEY: RIGHT.

THE COURT: SO HOW MUCH TIME DO YOU NEED? IS HE IN OR OUT?

MS. BRICKLEY: HE'S IN, SO I'M GOING TO HAVE TO TALK TO HIM ABOUT IT.

THE COURT: HOW MUCH TIME DO YOU NEED TO SUBMIT POINTS AND AUTHORITIES?

MS. BRICKLEY: HODARI WOULD PREFER -- I WOULD LIKE A WEEK ANYWAY AND HE WOULD PREFER THAT HE COULD BE RELEASED FROM CUSTODY. I FIRST WOULD LIKE TO ASK THE COURT IF YOU WOULD CONSIDER DOING THAT SO THAT I COULD HAVE SOME MORE TIME TO RESEARCH THIS. HIS MOTHER IS HERE. IT WAS MY UNDERSTANDING HE WAS ON PROBATION WHEN THIS OCCURRED. HOWEVER, I BELIEVE UP TO THIS TIME, HE HAD BEEN DOING WELL AND THAT HE -- HIS MOTHER SAID HE HAD BEEN GOING TO SCHOOL REGULARLY AND HE HAS BEEN IN CUSTODY NOW SINCE THIS INCIDENT OCCURRED.

THE COURT: I GATHER HE'S IN CUSTODY PURSUANT TO THE RECOMMENDATION OF THE PROBATION

DEPARTMENT AND CERTAINLY THE DECISION OF THE REFEREE.

MS. KENFIELD: YES.

THE COURT: I WOULD NOT BE INCLINED TO CHANGE THAT.

MS. BRICKLEY: WELL, I THINK IN THAT CASE, YOU'LL WAIVE TIME FOR A WEEK?

THE DEFENDANT: YES.

MS. BRICKLEY: OKAY.

THE COURT: TIME AND IRREGULARITIES ARE WAIVED, IS THAT CORRECT?

MS. BRICKLEY: YES.

THE COURT: THIS MATTER WILL THEN GO OVER ONE WEEK FOR FURTHER HEARING.

THE CLERK: MAY 19 AT 1:45 P.M.

THE COURT: IS THAT SATISFACTORY TO BOTH PARTIES?

MS. DULAN: I ASSUME THAT I'M SUPPOSED TO BE HERE? I HAVE JURY DUTY NEXT WEEK. I'M SUPPOSED TO BE CALLED ON THE 16TH AND I'M SUPPOSED TO BE AVAILABLE FOR TEN DAYS AT SUPERIOR COURT. I CAN SEE IF HIS FATHER IS GOING TO BE HERE.

THE COURT: WELL, IF EITHER PARENT IS HERE, THAT WOULD FINE.

MS. DULAN: I CAN'T SAY WITHOUT GETTING BACK HOME AND TALKING TO HIM. I IMAGINE HE COULD TAKE OFF FROM WORK BUT HE COULDN'T TODAY, SO I DON'T KNOW.

THE COURT: WOULD YOU RATHER GO TO JURY DUTY OR WOULD YOU RATHER BE HERE IF YOU HAD YOUR CHOICE?

MS. DULAN: I WOULD RATHER BE HERE.

THE COURT: ALL RIGHT. LET'S SEE IF WE CAN'T MAKE THAT EASIER FOR YOU. I'M ORDERING YOU TO RETURN HERE ON MAY 19 AT 1:45 P.M. THE CLERK WILL GIVE YOU WHATEVER YOU NEED TO BE GIVEN TO THE JURY COMMISSIONER AND THEY'LL UNDERSTAND YOU DON'T HAVE ANY CHOICE, YOU'VE GOT TO FOLLOW THE ORDERS OF THE JUDGE.

MS. DULAN: YES, THANK YOU.

THE COURT: IF THEY GIVE YOU ANY LIP ABOUT IT, CALL MY CLERK.

ALL RIGHT. MAY 19 AT 1:45 FOR FURTHER HEARING.

THURSDAY, MAY 19, 1988 1:45 P.M.

THE COURT OFFICER: THIS IS THE MATTER OF HODARI DULAN.

HODARI IS PRESENT, REPRESENTED BY MISS JANICE BRICKLEY OF THE PUBLIC DEFENDER'S OFFICE.

WITH HODARI, ARE YOU HIS MOTHER, MRS. PAULETTE ROBINSON?

THE MINOR'S MOTHER: YES.

THE COURT OFFICER: THANK YOU.

REPRESENTING THE DISTRICT ATTORNEY'S OFFICE IS MISS ANN KENFIELD.

THE MINOR'S MATTER IS ON THE CALENDAR FOR FURTHER HEARING, DECISION ON POINTS AND AUTHORITIES.

THE COURT: LET'S REOPEN IT FOR SOME DISCUSSION. I STILL HAVE THE SAME DIFFICULTIES I HAD BEFORE.

I WANT TO COMMEND BOTH PARTIES FOR SUBMITTING THEIR POINTS AND AUTHORITIES. I FIND THAT THE PUBLIC DEFENDER HAS SUBMITTED AN EXHAUSTIVE LIST OF POINTS AND AUTHORITIES WHICH CLEARLY ESTABLISH THAT MOST OF THE COURTS OF THE COUNTRY TEND TO FOLLOW THE RULE OF A THREATENED ILLEGAL SEARCH AS JUSTIFYING SUPPRESSION OF ANY EVIDENCE THAT IS DISCARDED AS A RESULT THEREOF. MANY OF THOSE CASES THAT ARE CITED, HOWEVER, ARE ONLY OF PERSUASIVE WEIGHT RATHER THAN WHAT I BELIEVE THAT THIS COURT IS OBLIGED TO FOLLOW.

CASES FROM OTHER STATES, CASES OF FEDERAL CASES OF LESS THAN THE UNITED STATES SUPREME COURT I FIND PERSUASIVE BUT THAT'S ALL.

LET ME ASK ONE OTHER QUESTION BECAUSE MAYBE YOU WANT TO RESPOND TO THIS, MISS KENFIELD. I DON'T FIND ANY FEDERAL CASES IN YOUR DOCUMENTS. MY RECOLLECTION IS THAT LANCE M. DECIDED THAT THE RULES ON SUPPRESSION, THE CALIFORNIA RULES ON SUPPRESSION, CALIFORNIA NO LONGER HAS A SEPARATE SET OF RULES ON SUPPRESSION FROM THE FEDERAL BUT THAT WE ARE NOW BOUND BY, AS FAR AS SEARCHES ARE CONCERNED, WE ARE NOW BOUND BY THE RULES AS THEY'RE APPLIED BY THE UNITED STATES SUPREME COURT.

DO YOU DISAGREE WITH THAT OR IS THAT YOUR RECOLLECTION OF THAT?

MS. KENFIELD: THAT IS, YES. I AGREE WITH THAT.

THE COURT: ALL RIGHT. NOW, THERE ARE SOME CASES CITED BY THE DEFENSE OF THE UNITED STATES SUPREME

COURT WHICH SEEM TO SUSTAIN HER POSITION -- I DON'T SEE ANY CITED IN YOUR MEMO UNLESS I FLAT OUT MISSED IT -- BY THE U.S. SUPREME COURT THAT SEEMED TO SUSTAIN THE PATRICK LINE OF CASES. DO YOU HAVE SOME OR DID I JUST MISS SOME OR DID YOU HAVE SOME THAT YOU DIDN'T PUT IN OR WHAT IS YOUR COMMENT?

MS. KENFIELD: I DID NOT HAVE ANY UNITED STATES SUPREME COURT CASES DIRECTLY ON POINT BECAUSE IT'S MY UNDERSTANDING THAT THERE ARE NONE. THERE IS CURRENTLY A THREATENED DETENTION CASE, AN ABANDONMENT CASE BEFORE THE UNITED STATES SUPREME COURT, BUT IT HAS NOT BEEN DECIDED.

IN LOOKING AT -- I HAVE NOT HAD A CHANCE SINCE I WAS OUT OF THE OFFICE YESTERDAY DUE TO -- AND THIS MORNING DUE TO ILLNESS, TO READ ALL OF THE CASES CITED BY DEFENSE COUNSEL, PARTICULARLY THE FACTUAL BASIS FOR WHICH THEY WERE, BUT I DID NOT CITE ANY FEDERAL -- ANY UNITED STATES SUPREME COURT CASES OTHER THAN AS THEY WERE, AS THEY HAVE BEEN CITED AND APPLIED BY THE UNITED STATES SUPREME COURT --

THE COURT: ALL RIGHT. NOW, LET ME SEE.

MS. KENFIELD: -- OR BY THE CALIFORNIA COURTS.

THE COURT: LET ME SEE IF I OVERSTATED CITES IN THE DEFENSE MEMO. AND I NOTICE ON PAGE EIGHT OF HER MEMO SHE CITES A MISSOURI CASE WHICH I WILL NOT DEEM AS BINDING BUT THE REFERENCE TO IT IS THAT THAT COURT RELIED UPON WONG SUN AGAINST THE UNITED STATES WHICH IS A U.S. SUPREME COURT CASE.

I AM NOT FAMILIAR WITH WONG SUN. ARE YOU?

MS. KENFIELD: YES, YOUR HONOR. I'M NOT FAMILIAR WITH THE FACTS IN WONG SUN BUT WONG SUN IS CITED IN JUST ABOUT ALL OF THE CASES THAT I CITED. IT'S THE CASE THAT ESTABLISHED THE DOCTRINE OF FRUIT OF THE POISONOUS TREE. PATRICK CITES WONG SUN; ROBERT D. CITES WONG SUN; MENIFEE CITES WONG SUN; WASHINGTON CITES WONG SUN; HOLLOWAY CITES WONG SUN.

THE COURT: THE PRINCIPLE OF FRUIT OF THE POISONOUS TREE I'M THOROUGHLY FAMILIAR WITH. YOUR POSITION IS THAT WONG SUN IS RELEVANT ONLY ON THAT ISSUE; IT'S NOT RELEVANT TO THE ISSUE OF WHETHER OR NOT A THREATENED ILLEGAL DETENTION JUSTIFIES A SUPPRESSION OF ABANDONED CONTRABAND?

MS. KENFIELD: MY MEMORY OF WONG SUN IS THAT IT INVOLVED A -- SOMETHING FAR MORE THAN A THREATENED ILLEGAL DETENTION.

THE COURT: YOUR RECOLLECTION?

MS. BRICKLEY: TO TELL THE TRUTH I DON'T REALLY REMEMBER THE FACTS OF WONG SUN. I SHOULD HAVE LOOKED THAT UP. THAT IS SORT OF -- WHEN WE WERE IN LAW SCHOOL THAT WAS THE STANDARD CASE; THAT WAS THE FIRST CASE THAT DEVELOPED THIS FRUIT OF THE POISONOUS TREE DOCTRINE. I DON'T BELIEVE IT WAS AN EXACT SIMILAR SITUATION TO THIS, ALTHOUGH REID VS. GEORGIA, WHICH IS ANOTHER U.S. SUPREME COURT CASE, WAS ALMOST AN IDENTICAL SITUATION TO THE ONE WE HAVE BEFORE US.

THE COURT: WHERE DO YOU HAVE THAT CITED?

MS. BRICKLEY: RIGHT AT THE BEGINNING, THE FIRST PAGE OF MY BRIEF,

AND I JUST READ THAT LAST WEEK AND IT'S VERY CLOSE.

THE COURT: DO YOU RECALL THE FACTS IN REID?

MS. BRICKLEY: YES. IT WAS AT THE AIRPORT. EXACTLY AS IT SAID, THEY APPROACHED HIM BECAUSE THEY THOUGHT HE MET THE DRUG PROFILE AND THEY ASKED HIM TO COME OVER, AND HE RAN AND HE DROPPED SOMETHING.

THE COURT: THE OLD DRUG PROFILE CASE ALL RIGHT.

MS. BRICKLEY: HE RAN AND HE DROPPED SOMETHING, AND THE COURT HELD THAT IT HAD TO BE SUPPRESSED, AGAIN CITING WONG SUN.

THE COURT: THAT'S NOT ONE OF THOSE CASES THAT YOU COPIED AND GAVE TO ME, IS IT?

MS. BRICKLEY: IT'S NOT. I DON'T KNOW WHY I DIDN'T. I GUESS I WAS THINKING YOU HAD THAT.

THE COURT: I HAVE NO FEDERAL CASES AT ALL.

MS. BRICKLEY: I THOUGHT YOU HAD THE U.S. I CITE -- I DID XEROX THE TWO FEDERAL CASES. WE DON'T HAVE THAT EITHER, UNFORTUNATELY. NONE OF THE --

THE COURT: I HAVE TO GO TO ONE OF THE TWO LIBRARIES, EITHER IN THE OAKLAND MUNI COURT OR THE COURT HOUSE.

MS. BRICKLEY: IF YOU'RE VERY INTERESTED WE COULD PASS THIS AND I COULD RUN OVER. WHERE I READ IT IS THE ONE AT THE OAKLAND MUNI LIBRARY.

THE COURT: I APPRECIATE THE DOCTRINE OF STARE DECISIS AND I KNOW WHEN I'VE GOT TO FOLLOW THE DICTATES OF THE COURTS THAT ARE SUPERIOR TO MINE. MY GUT DISAGREES WITH THIS REASONING BUT MY GUT DOESN'T HAVE ANYTHING TO DO WITH IT IF THEY TELL ME I'VE GOT TO DO IT. BUT --

MS. BRICKLEY: THERE'S ALSO THAT CASE, THE BADILLO OPINION, WHICH IS A CALIFORNIA SUPREME COURT CASE WHICH I CITE RIGHT AFTER THAT WHICH I BELIEVE YOU PROBABLY WOULD HAVE THAT WHICH AGAIN IS THE SAME SITUATION.

THE COURT: I SAW BOTH BADILLO AND THERE'S ANOTHER CASE OUT THAT CITES BADILLO AND DIFFERENTIATES WHAT THEY MEANT AND BOTH OF WHICH ARE STATE SUPREME COURT CASES, BUT MY ASSUMPTION IS THAT LANCE M. SUPERCEDES ALL OF THOSE WHEN THEY SAY, WE NOW RELY SOLELY UPON THE U.S. SUPREME COURT.

MS. BRICKLEY: UNLESS THEY'RE CONSISTENT, WHICH IT WOULD BE, THOSE WOULD BE CONSISTENT WITH THE U.S. SUPREME COURT CASE. AS LONG AS THEY'RE CONSISTENT IT WOULD STILL BE GOOD LAW. THOSE WOULD BE CONSISTENT WITH THE U.S.

THE COURT: WHAT I'M CONCERNED WITH IS, WHAT WAS THE REASONING IN THE U.S. SUPREME COURT CASE TO DETERMINE WHETHER OR NOT THAT REASONING APPLIES TO THE FACT SITUATION IN THIS CASE?

AND I SAY I DON'T KNOW REID. ARE YOU FAMILIAR WITH REID?

MS. KENFIELD: NO.

THE COURT: YOU COULD HAVE STAYED AT HOME AND NURSED YOUR COLD, LADY, ALL THE GOOD YOU'RE DOING ME TODAY.

GO AHEAD.

MS. BRICKLEY: THIS IS HORRIBLE. I SHOULD HAVE XEROXED THAT CASE. I GUESS I WAS THINKING THAT WE HAD THAT HERE BUT I'VE READ SO MANY CASES I CAN'T QUITE REMEMBER WHETHER THEY SPECIFICALLY ADDRESS THAT, BUT I KNOW ALMOST EVERY CASE THAT I ADDRESSED, THE WAY THEY FRAMED THE ISSUE WAS AROUND THIS ISSUE OF ABANDONMENT.

THE PROSECUTION'S ARGUMENT IS GENERALLY SIMILAR TO YOUR LINE OF THINKING, I THINK, WHICH IS THAT IF SOMEBODY VOLUNTARILY DROPS SOMETHING, EVEN IF IT'S IN RESPONSE TO POLICE -- ILLEGAL POLICE CONDUCT, THAT'S A VOLUNTARY ACT AND THEREFORE THAT SORT OF DISSIPATES THE TAINT OF THE PRIOR ILLEGALITY. THAT'S THE DISTRICT ATTORNEY'S ARGUMENT AND ALL OF THESE CASES.

THE COURT'S RESPONSE IS CONSISTENTLY WHEN THEY TALK ABOUT THIS ABANDONMENT THEY COMPARE IT OFTEN TO A CONSENT TYPE OF THING WHERE SOMEBODY CONSENTS TO A SEARCH BUT THE COURT FINDS THAT THAT CONSENT WAS THE PRODUCT OF A PRIOR ILLEGAL DETENTION, THAT IT'S NOT VOLUNTARY, YOU CANNOT CONSIDER SOMETHING VOLUNTARY WHEN IT IS IN DIRECT RESPONSE TO THE UNLAWFUL POLICE CONDUCT.

AND THE VERY FEW, FEW CASES WHICH HAVE GONE THE OTHER WAY ARE ALL DISTINGUISHABLE IN THE SENSE, EXCEPT WITH THE POSSIBLE EXCEPTION OF PATRICK WHICH I JUST THINK IS BASICALLY NOT INCONSISTENT WITH ALL OTHER CASES, THEY ALL ARE DISTINGUISHABLE IN THAT THERE'S SOMETHING THAT DISSIPATES IT.

IN THE ROBERT OPINION THAT THE DISTRICT ATTORNEY CITES WHAT THE MINOR

DOES IN THAT CASE IS HE CONTINUES TO COMMIT --

THE COURT: LET ME INTERRUPT YOU BECAUSE MY MIND SET IS SUCH THAT IF I'VE GOT TO DO IT BECAUSE U.S. SUPREME COURT SAYS DO IT, I'LL DO IT. UNLESS THEY TELL ME I'VE GOT TO DO IT, I'M NOT GOING TO DO IT BECAUSE I THINK THE REASONING IS FLAWED.

MS. BRICKLEY: I'M NOT GOING TO CONVINCE YOU OF THE REASONING BUT THAT'S WHAT THEY TALK ABOUT, THE CASES. AND I BELIEVE REID HAS A DISCUSSION OF THIS ISSUE OF ABANDONMENT AND IT'S NOT A VOLUNTARY ABANDONMENT IS THE REASONING THEY USE, AND THAT'S WHAT THE FEDERAL CASES I GAVE YOU TALK ABOUT, THAT ALSO AS WELL AS ALL OTHER STATE CASES; THAT IF IT'S NOT -- IF IT'S IN RESPONSE TO THIS POLICE CONDUCT, IT'S NOT A VOLUNTARY ABANDONMENT, IT'S NOT A VOLUNTARY ACT.

THE COURT: NOW, IS REID THE ONLY U.S. SUPREME COURT CASE THAT YOU HAVE ON THAT POINT?

MS. BRICKLEY: I THINK IT IS. LET ME JUST DOUBLECHECK. THERE'S SOME OTHER ONES LIKE WONG SUN, WHICH YOU KNOW.

THE COURT: THAT'S ON AN ANCILLARY POINT AS I UNDERSTAND.

MS. BRICKLEY: YEAH. IT DOESN'T DIRECTLY, ALTHOUGH I WOULD BE INTERESTED IN READING THAT.

ALSO THE ONES I CITED AT THE END WHICH REFER TO THE CONSENT, AND IT'S THE EXACT SAME RATIONALE WHERE THE CONSENT IS THE PRODUCT OR IS THE RESULT OF UNLAWFUL POLICE CONDUCT, AND I'VE CITED SOME U.S. SUPREME COURT CASES THE LAST COUPLE OF PAGES OF THE BRIEF ON THAT PROPOSITION.

MAYBE THEY WERE FED. CASES. I'M SORRY. I GUESS THEY WERE JUST FEDERAL CASES. I THOUGHT IT WAS U.S. SUPREME COURT, THOSE TWO FED. CASES.

SO I GUESS THAT IS -- HERE WE GO. FLORIDA VS. BOYER. THAT'S THE OTHER ONE.

THE COURT: ALL RIGHT.

MS. BRICKLEY: CONSENT AFTER ILLEGAL DETENTION, RIGHT.

THE COURT: WHAT I'LL WANT THEN ARE COPIES OF REID AGAINST GEORGIA, 1980 CASE, 448 U.S. 438, AND I WILL WANT -- YOU WANT ME TO TAKE A LOOK AT WONG SUN?

MS. BRICKLEY: YEAH. I'D BE INTERESTED TO SEE IT MYSELF.

THE COURT: WONG SUN VS. U.S., 1963 CASE, 371 U.S. 471, AND FLORIDA AGAINST ROYER, R.O.Y.E.R., 1983 CASE, 460 U.S. 491. THOSE ARE THE THREE U.S. SUPREME COURT CASES THAT I UNDERSTAND YOU CONTEND RELATE TO THIS ISSUE IN SOME REASONABLY CONCRETE WAY.

WHEN CAN YOU GIVE ME COPIES OF THOSE?

MS. BRICKLEY: I COULD RUN OVER RIGHT NOW. IF YOU HAVE ANOTHER MATTER YOU'D WANT TO DO, I COULD RUN OVER.

WOULD YOU PREFER THAN WAIT AROUND TODAY AND GET THIS OVER WITH TODAY RATHER THAN COME BACK MONDAY?

THE MINOR'S MOTHER: YES.

MS. BRICKLEY: WHY DON'T I GO OVER RIGHT NOW AND I COULD PROBABLY BE BACK 45 MINUTES TO AN HOUR.

THE COURT: WHY DON'T WE PASS THIS. CAN YOU MAKE AN EXTRA COPY? I

KNOW YOU DON'T WANT TO BE TOO HELPFUL TO THE D.A. BUT THEY'D LIKE ONE TOO.

MS. BRICKLEY: I KNOW.

THE COURT: WE'LL PASS THIS. THANK YOU.

MS. BRICKLEY: BUT I WANT YOUR MONEY THOUGH, XEROX MONEY.

MS. KENFIELD: WAIT A MINUTE.

MS. BRICKLEY: THERE WAS ONE OUT OF STATE CASE I DID WANT YOU TO CONSIDER.

THE COURT: OUT OF STATE?

MS. BRICKLEY: MICHIGAN STATE.

(A BRIEF RECESS WAS TAKEN, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD:)

THE COURT: I WANT TO THANK MISS BRICKLEY FOR HAVING GIVEN ME COPIES OF THE THREE CASES, UNITED STATES SUPREME COURT CASES: TOMMY REID AGAINST THE STATE OF GEORGIA, WONG SUN AGAINST THE UNITED STATES AND FLORIDA AGAINST MARK ROYER.

I'VE READ ALL THREE OF THEM SOMEWHAT HURRIEDLY BUT I WENT OVER THEM AND I THINK I GOT THE GIST OF IT. TELL ME IF YOU DISAGREE WITH ME.

AS TO THE TOMMY REID CASE THERE WAS AN ACTUAL STOP MADE AND AFTER THE STOP THE OFFICERS WANTED TO GO FURTHER IN THEIR INVESTIGATION. THEY ASKED THE DEFENDANT PERMISSION TO DO SO. I THINK THIS IS THE ONE WHEREIN HE SAID YES, BUT WHEN HE STARTED WALKING WITH THEM TO GIVE THEM PERMISSION TO CONDUCT A SEARCH HE TOOK OFF RUNNING AND THREW THE STUFF AWAY.

THE KEY THING THERE APPEARS TO ME IS THERE WAS AN ACTUAL STOP BY THE POLICE IN THAT SITUATION, AND THE COURT DETERMINED THAT THE INITIAL STOPPING CONSTITUTED A SEIZURE. THIS WASN'T A SITUATION OF A THREATENED DETENTION OR SIMPLY A THREATENED SEARCH, AND I THINK THAT DIFFERS SUBSTANTIALLY FROM WHAT WE HAVE HERE.

WHAT WE HAVE IS THE QUESTION WHETHER THERE IS A THREATENED DETENTION OR A THREATENED SEARCH BUT NO ACTUAL STOP BEFORE THE DISCARDING OF THE CONTRABAND.

AND THE WONG SUN – WELL, GO BACK. THE FLORIDA AGAINST MARK ROYER CASE, AGAIN I FIND THAT THERE WAS AN ACTUAL DETENTION AND A SEARCH AND BASED UPON WHAT THE COURT FOUND TO BE INVALID CONSENTS, BUT THE FACT OF THE MATTER IS, THIS WAS AGAIN NOT THE CASE OF A THREATENED DETENTION OR A THREATENED SEARCH BUT WAS AN ACTUAL DETENTION AND AN ACTUAL SEARCH. IT WAS NOT A THROW AWAY SITUATION AT ALL.

AND IN WONG SUN, THE WONG SUN CASE HAD TO DO, AS WE HAD AGREED EARLIER I THINK, WITH THE DOCTRINE OF THE FRUITS OF A TAINTED DETENTION. AND IN THAT SITUATION IT HAD NOTHING TO DO WITH SOMETHING TO BE THROWN AWAY BASED UPON A THREATENED SEARCH OR A THREATENED DETENTION. AGAIN THERE WAS -- THERE WERE ACTUAL DETENTIONS AND THERE WAS A STATEMENT OR A GROUP OF STATEMENTS ACTUALLY THAT WERE GIVEN DURING THAT DETENTION, AND THE DETERMINATION WAS WHETHER OR NOT THOSE STATEMENTS WERE ADMISSIBLE.

I DON'T FIND ANY OF THESE CASES TO DEAL WITH THE ISSUE THAT WE'RE FACED

WITH HERE. I'LL HEAR HOW YOU READ THEM DIFFERENTLY.

MS. BRICKLEY: WELL, TWO REASONS. I REALLY DON'T SEE THE DIFFERENCE BETWEEN WHETHER THERE'S AN ACTUAL DETENTION OR, AS YOU SAY, THE THREAT OF A DETENTION.

FIRST OF ALL, THE MOST RECENT CASE ON THIS, WASHINGTON, SPECIFICALLY SAYS THAT THEY'RE NO LONGER USING THE LANGUAGE OF A THREAT OF THE DETENTION. sOME OF THE STATE COURT OPINIONS I GAVE YOU ALSO TALKED ABOUT THIS. THEY SAY ONCE SOMEBODY IS PURSUED, THERE IS A SEIZURE; EVEN IF THE PERSON, IT ISN'T PHYSICALLY IN THEIR POSSESSION, THAT IS A SEIZURE, THAT IS A DETENTION.

THE WASHINGTON OPINION, WHERE IT WAS IDENTICAL TO THIS SITUATION, HE'S BEING CHASED AND THEY CALL THAT A DETENTION ITSELF, BUT WHETHER YOU CALL IT THREATENED OR AN ACTUAL DETENTION, I REALLY DON'T SEE WHAT THE DIFFERENCE IS. I MEAN, IN THE REID OPINION THE PERSON, THE DEFENDANT IN THAT CASE, COULD HAVE, AS YOU HAD SUGGESTED LAST TIME WE WERE IN COURT, COULD HAVE, RATHER THAN RUNNING AND DISCARDING THE PROPERTY JUST AS THE SAME AS IN THIS, COULD HAVE JUST WAITED, HAD THE OFFICERS SEARCH HIM, AND THEN COME TO COURT, AND IT WOULD HAVE CLEARLY HAVE BEEN AN UNLAWFUL SEARCH. BUT HE, AS IN THIS CASE, PROCEEDED TO RUN AND DISCARD THE EVIDENCE.

THE COURT: YES, BUT HE HAD BEEN DETAINED FIRST.

MS. BRICKLEY: I DON'T UNDERSTAND WHAT THE REAL DISTINCTION RATIONALLY IS. THE FACT OF THE MATTER IS, THERE'S AN UNLAWFUL ACT WHETHER IT'S A THREATENED DETENTION OR A DETENTION, AND AS A RESULT OF THAT UNLAWFUL ACT

THE DEFENDANT RESPONDS NOT VOLUNTARILY BUT RESPONDS TO THAT UNLAWFUL ACT. AND I JUST DON'T SEE WHAT THE DIFFERENCE IS RATIONALLY BETWEEN, BETWEEN WHETHER IT'S A THREATENED OR -

THE COURT: THE DIFFERENCE I SEE IS WHETHER OR NOT THE UNITED STATES SUPREME COURT HAS HANDED DOWN A RULE THAT I'VE GOT TO FOLLOW. IN THIS, IN THESE CASES, THE ONE I WAS SPEAKING ABOUT, THERE HAVE BEEN ACTUAL PHYSICAL DETENTIONS WHICH DIFFER FROM THIS CASE, WHICH MEANS THAT THAT'S WHAT I'M LOOKING AT. I'M TRYING TO FIND A CASE THAT SAYS ANY SIMILAR TYPE CASES, JUDGE, YOU'VE GOT TO FOLLOW THAT RULE WHETHER YOU LIKE IT OR NOT. THAT'S THE ONLY PLACE THAT I FIND IT RELEVANT.

FRANKLY, I DON'T AGREE WITH THEIR REASONING IN THE DETENTION CASES. I THINK THEIR REASONING IS FLAWED, THAT THEY NEED TO FIND THAT IT WAS IN FACT AN ILLEGAL SEARCH, AND IF THEY FIND IT'S AN ILLEGAL SEARCH, THEN THEY OUGHT TO SUPPRESS THE EVIDENCE.

BUT, YOU KNOW, I CAN'T SECOND-GUESS THE UNITED STATES SUPREME COURT, BUT I DON'T HAVE TO STRETCH THE OPINION BEYOND WHAT THEY SAY, AND THAT'S WHERE I SEE THE DIFFERENCE BETWEEN THESE CASES AND THE CASE WE'VE GOT HERE.

MS. BRICKLEY: WELL, AS I SAID IN RESPONSE TO U.S. SUPREME COURT CASES, I DON'T -- I MEAN GRANTED, I GRANT THERE IS A FACTUAL, THERE IS SOMEWHAT OF A FACTUAL DISTINCTION THERE. I JUST DON'T SEE HOW THE FACTUAL DISTINCTION TRANSLATES INTO ANY DIFFERENCE IN THE REASONING. I THINK WE'RE STILL DEALING WITH THE FRUIT TYPE OF ANALOGY.

IN ADDITION, I THINK WE HAVE A CALIFORNIA SUPREME COURT CASE WHICH IS

NOT INCONSISTENT WITH ANY FEDERAL CASES, IN FACT CONSISTENT WITH THE FEDERAL LINE OF REASONING, AND A MORE RECENT FIRST DISTRICT COURT OF APPEALS OPINION, MORE RECENT THAN PATRICK, BOTH WHICH DEAL WITH SITUATIONS, BADILLO AND WONG SUN, BOTH DEAL WITH SITUATIONS IN WHICH THE PERSON WAS NOT ACTUALLY DETAINED, WAS NOT ACTUALLY SEARCHED, AND THE PERSON FLED AND THE PERSON DISCARDED EVIDENCE. AND IN BOTH OF THOSE OPINIONS WHICH SPECIFICALLY ADDRESS THAT ISSUE AND --

THE COURT: YOU AND I BOTH KNOW THAT. AND AS WE HAVE AGREED, THERE ARE DIVERGENT COURT OF APPEAL DECISIONS ON THAT POINT, ON A THREATENED --

MS. BRICKLEY: ONE OF THE CASES I TALKED ABOUT IS A CALIFORNIA SUPREME COURT DECISION.

THE COURT: -- WHERE THEY COME DOWN.

WHICH CASE ARE YOU REFERRING TO?

MS. BRICKLEY: THE BADILLO. WHAT HAPPENS IN BADILLO, THE 46 CAL.2ND OPINION, WHAT HAPPENS IN THERE IS THAT THEY UNLAWFULLY ENTER ABOUT BADILLO'S HOUSE BUT THEY DO NOT DETAIN HIM. IN FACT THEY DON'T THREATEN TO SEARCH HIM OR ANYTHING. HE RUNS OUT THE DOOR AND DISCARDS THE PROPERTY AND THE COURT SAYS IT'S GOT TO GO.

THE COURT: I READ BADILLO. I THINK THEY REACHED THAT DECISION ON THE SAME BASIS THAT WASHINGTON REACHED ITS DECISION. THEY'RE SIMPLY SAYING THAT CERTAIN TRANSGRESSIONS BY THE POLICE ARE SO EGREGIOUS, ARE SO BAD, THAT NOTHING THAT THEY TURN UP OUGHT TO BE PERMITTED TO BE USED.

IN THE WASHINGTON CASE THEY SAID, FOR POLICE TO CHASE SOMEBODY DOWN AND GET SOMETHING AND THEY THROW SOMETHING AWAY WHEN THE ONLY, THE BASIC REASON WHY THE POLICE ARE DOING IT IS BECAUSE OF THE RACE OF THE PERSON, THEY SAID THAT'S SO GOD AWFUL BAD THAT WE DON'T GIVE A DAMN WHAT YOU FIND, THAT'S NOT GOING TO GO INTO EVIDENCE.

IN BADILLO I'M READING THEM AS SAYING WHEN YOU BREAK INTO SOMEBODY'S HOUSE WHEN YOU HAVE NO LEGAL RIGHT TO DO THAT, WHATEVER YOU FIND AS A RESULT OF THAT IS SO EGREGIOUS THAT WE WILL NOT LET IT COME IN, PERIOD.

NOW, THOSE CASES ARE BEING BASED UPON THAT PRINCIPLE IN AND OF ITSELF.

MS. BRICKLEY: WELL, THE CASES TALK ABOUT THE DIFFERENT THINGS THAT THE COURT SHOULD CONSIDER IN DECIDING WHERE THIS, ABANDONMENT, WHERE THERE'S ENOUGH ATTENUATION BETWEEN THE ILLEGAL CONDUCT OF THE POLICE AND THE ACT OF THE DEFENDANT. AND THAT'S ONE OF THE FACTORS, BUT THEY ALSO TALK ABOUT THE PROXIMITY WHICH, AND CLEARLY IN THIS CASE THERE WAS ONE MINUTE LESS THAN IN WASHINGTON, AND THEY TALK ABOUT WHETHER THERE WERE ANY INTERVENING ACTS SUCH AS SOMETHING THE DEFENDANT HIMSELF DOES UNLAWFULLY, AS IN THE ROBERT OPINION.

THIS CASE, IT SEEMS TO ME, IS SO CLOSE TO WASHINGTON FACTUALLY. I MEAN IN THIS CASE THE OFFICER SEES THESE MINORS ARE STANDING AROUND A CAR, I MEAN, YOU KNOW, THE OFFICERS -- HUDDLED, BUT WHEN I ASKED HIM --

THE COURT: I KNOW IT'S CLOSE TO WASHINGTON. ON WASHINGTON, IF I WERE FOLLOWING IT STRAIGHT, YOU WON'T HAVE ANY ARGUMENT.

MS. BRICKLEY: BUT I GUESS THE POINT I'M MAKING IS, I THINK THE CONDUCT IN THIS CASE IS ALSO EGREGIOUS. THESE PEOPLE WERE DOING NOTHING WRONG. THEY WERE STANDING AROUND A CAR AND THEY RAN FROM THE POLICE OFFICER. THE LAW IS CLEAR THAT PEOPLE HAVE A RIGHT TO DO THAT. I JUST DON'T SEE THAT THERE WAS ANY REASON.

AND AS I SAID IN MY BRIEF, I THINK IT'S A VERY DANGEROUS PRECEDENT, BECAUSE IF YOU SAY THAT BECAUSE THAT AN OFFICER CAN MAKE AN UNLAWFUL DETENTION AND THEN IF THE PERSON DISCARDS SOMETHING IT CAN COME INTO COURT, WHAT IS TO STOP POLICE OFFICERS FROM THEN KNOWING THAT, KNOWING THAT IT'S WORTH IT TO GIVE AN ATTEMPT TO CHASE AFTER SOME KID WHO'S JUST STANDING ON THE STREET, BECAUSE WE ALL KNOW THAT HAPPENS, AND IN RESPONSE TO THAT THEY'RE GOING TO DISCARD SOMETHING. AND WHO CARES IT WAS UNLAWFUL WHAT THEY DID TO BEGIN WITH, THEY CAN GET EVIDENCE INTO COURT. THE WHOLE PURPOSE OF THE EXCLUSION RULE IS DETERRENCE. AND I THINK IF THAT'S THE PURPOSE --

THE COURT: DON'T THESE CASES SAY THAT ALL, ALL ILLEGAL ACTIVITY OF POLICE OFFICERS DOES NOT JUSTIFY A SUPPRESSION OF THE EVIDENCE AS ULTIMATELY SUSTAINED?

MS. BRICKLEY: IF IT'S ATTENUATED.

THE COURT: BUT DON'T THEY SAID JUST BECAUSE A COP ACTS ILLEGALLY, THAT IN AND OF ITSELF IS NOT DETERMINATIVE OF WHETHER OR NOT THE EVIDENCE OUGHT TO BE SUPPRESSED?

MS. BRICKLEY: RIGHT.

THE COURT: IF I FOLLOW YOUR REASONING, THOUGH, EVERY TIME THE COPS

DO SOMETHING AUTOMATICALLY WRONG, AUTOMATICALLY IT SHOULD BE SUPPRESSED.

MS. BRICKLEY: IF IT'S A DIRECT CONNECTION THERE.

THE COURT: YOU SAY DIRECT CONNECTION IF THE MINOR DOES SOMETHING, IF HE THROWS THE STUFF AWAY?

MS. BRICKLEY: IF HE – 10 MINUTES LATER OBVIOUSLY, YOU KNOW, THERE WOULDN'T BE A DIRECT CONNECTION, BUT WHEN HE SEES THE OFFICER RUNNING TOWARDS HIM, LOOKS STARTLED AT HIM AND THEN THROWS THE STUFF, I THINK BY NO STRETCH OF THE IMAGINATION CAN YOU SAY THAT THERE WASN'T A DIRECT LINK THERE.

THE COURT: I KNOW WHY HE DID IT. I'M NOT DUMB. I MEAN I KNOW WHY HE DID IT. THE QUESTION IS WHETHER OR NOT IT OUGHT TO BE SUPPRESSED. LET ME –

WERE YOU THE ONE WHO TOLD ME THERE'S A CASE UP NOW BEFORE THE UNITED STATES SUPREME COURT ON THIS ISSUE?

MS. KENFIELD: THAT'S WHAT I WAS TOLD BY MISS QUIST OF OUR OFFICE. I SPECIFICALLY ASKED FOR UNITED STATES SUPREME COURT AUTHORITY AND SHE SAYS THERE'S SOMETHING PENDING, BUT....

THE COURT: BUT THEY HAVE GRANTED CERTIORARI ON IT?

MS. KENFIELD: SOMETHING IS PENDING. THERE IS A CASE PENDING WITH REGARD TO ABANDONED AND THREATENED LEGAL DETENTION.

THE COURT: ONE OF MY QUESTIONS IS, IF IT'S PENDING, IF THEY'VE DECIDED THEY WOULD HEAR IT, WHY WOULD THEY DO THAT IF THEY'VE ALREADY RULED ON IT?

MS BRICKLEY: PROBABLY BECAUSE IT'S AN ISSUE THAT HAS ARISEN SO OFTEN AND THERE'S NO DIRECT DISCUSSION OF IT. AND, TO ME, THE RULING CLEARLY IMPLIES THAT, BECAUSE OF THE FACTS OF THE SITUATION, BUT THEY DON'T DIRECTLY ADDRESS THAT ISSUE. IT'S AN ISSUE THAT'S OBVIOUSLY – I MEAN IN THIS STATE WE'VE HAD A CONFLICT OF AUTHORITY. I DON'T KNOW. IT'S POSSIBLE THE SUPREME COURT WILL CHANGE ITS RULING. I CAN'T PREDICT WHAT THE NEW SUPREME COURT WILL DO BUT WHAT I'M SAYING IS, BY THE SAME RATIONALE YOU CAN SAY IF THEY DID WANT TO CHANGE THE RULING IT'S BECAUSE IT IS THE WAY IT IS NOW AND BECAUSE THE FEDERAL COURTS HAVE CONSISTENTLY. AND I'VE GIVEN YOU FEDERAL COURT OF APPEAL OPINIONS WHICH WOULD ALSO BE BUT THAT'S ALSO –

THE COURT: WE'RE NOT BOUND BY THOSE AND THEY GO ALL OVER THE LOT WITH SLOPPY REASONING BUT, AT ANY RATE, WE'RE NOT BOUND.

MS. BRICKLEY: THAT IS THE FEDERAL LAW.

THE COURT: WITH THE SLOPPY REASONING THEY HAVE HELD WHAT YOU'VE JUST SAID THEY HELD. WE'RE NOT QUARRELING WITH THAT.

ALL RIGHT. HAVE YOU GOT ANYTHING YOU WANT TO ADD?

MS. KENFIELD: NO, YOUR HONOR, NOT THAT ISN'T IN MY BRIEF OR THAT THE COURT HAS ALREADY STATED.

THE COURT: ALL RIGHT. IS THE MATTER SUBMITTED?

MS. BRICKLEY: YES.

MS. KENFIELD: YES.

THE COURT: THE MOTION IS DENIED.

NOW WHERE ARE WE?

MS. BRICKLEY: I THINK WE WILL HAVE A STIPULATION AT THIS POINT; IS THAT RIGHT? LET ME JUST HAVE A SECOND.

MS. KENFIELD: THE ONLY THING I WOULD LIKE TO DO, JANICE, IS HAVE MARKED, FOR EASE OF THE COURT DISPOSING OF THE MONEY AND THE BEEPER --

THE COURT: WHAT DO YOU WANT?

MS. KENFIELD: YOUR HONOR, I'D LIKE -- LET ME GET OFFICER MCCOLGIN.

IN PREPARATION FOR THE STIPULATION, YOUR HONOR, I WOULD LIKE TO HAVE MARKED AS PETITIONER'S NUMBER 2, AN OAKLAND POLICE DEPARTMENT EVIDENCE ENVELOPE THAT OFFICER MCCOLGIN HAS HANDED ME, WITH THE REPORT NUMBER 88-44699, WITH AN EVIDENCE TAG ATTACHED WITH THE NAME OF THE MINOR, HODARI DULAN, THE ADDRESS 6225 FOOTHILL. I'D LIKE THAT MARKED AS PETITIONER'S 2.

THE COURT: YES.

(PETITIONER'S EXHIBIT NO. 2, AN EVIDENCE ENVELOPE, WAS MARKED FOR IDENTIFICATION.)

MS. KENFIELD: I WOULD LIKE TO HAVE MARKED AS PETITIONER'S 2A, A SMALL MANILA ENVELOPE WHICH I HAVE REMOVED FROM THE LARGER ENVELOPE, AND IN ITS CONTENTS. THE CONTENTS OF THE SMALL MANILA ENVELOPE IS A MOTOROLA BEEPER OR TELEPHONE PAGING DEVICE WITH THE NUMBER 1917 -- EXCUSE ME -- 191478.

THE COURT: IT WILL BE SO MARKED.

(PETITIONER'S EXHIBIT NO. 2A, A MANILA ENVELOPE WITH A MOTOROLA BEEPER, WAS MARKED FOR IDENTIFICATION.)

MS. KENFIELD: I WOULD LIKE TO HAVE MARKED AS PETITIONER'S NUMBER 3, A GROUP EXHIBIT, AN OAKLAND POLICE DEPARTMENT MONEY ENVELOPE THAT IS SEALED WITH THE PROPERTY SECTION MONEY SEAL NUMBERED 09106, WITH THE OFFICER'S NAME OF BRIAN MCCOLGIN AND JERRY PERTOSO, AN EVIDENCE TAG SEAL ON IT WITH THIS MINOR'S NAME, HODARI DULAN.

I'D LIKE THE RECORD REFLECT THAT I AM OPENING THAT BY BREAKING THE SEAL.

JANICE, YOU'LL AGREE THAT IT'S SEALED?

MS. BRICKLEY: (NODS HER HEAD UP AND DOWN.)

MS. KENFIELD: AND REMOVING FROM IT SOME UNITED STATES CURRENCY: FIVE 20'S, ONE 10, TWO 5'S, AND 10 ONE'S. AND I'D LIKE THAT MARKED AS GROUP EXHIBIT PETITIONER'S 3.

THE COURT: I GET A TOTAL OF 130. IS THAT WHAT YOU GET?

THE CLERK: 30?

THE COURT: 130.

THE CLERK: YES.

THE COURT: ALL RIGHT. THAT WILL BE NUMBER 3 FOR IDENTIFICATION.

(PETITIONER'S EXHIBIT GROUP NO. 3, A MONEY ENVELOPE WITH CURRENCY, WAS MARKED FOR IDENTIFICATION.)

MS. KENFIELD: AND FOR THE PURPOSES OF HANDLING, I'LL MOVE THEM INTO EVIDENCE AT THIS TIME.

THE COURT: ANY OBJECTION? SHE MOVED THESE EXHIBITS INTO EVIDENCE. ANY OBJECTION?

MS. BRICKLEY: I OBJECT TO EVERYTHING. I DO OBJECT. I OBJECT TO ANYTHING OTHER THAN THE -- I THINK IT WAS THE FIRST EXHIBIT WHICH WAS THE ONE ROCK. I THINK THE OTHER EXHIBITS ARE IRRELEVANT. THERE'S BEEN, THERE WAS AN EXHIBIT WITH 15 ROCKS AND THERE'S BEEN NO TESTIMONY THAT MY CLIENT HAD ANYTHING TO DO WITH THAT EXHIBIT.

THE COURT: SHE'S MOVED 2, 2A AND 3, THESE ITEMS THAT SHE'S JUST HAD MARKED.

MS. BRICKLEY: I THINK THAT THE BEEPER AND THE MONEY ARE IRRELEVANT TO AN 11350 CHARGE.

THE COURT: ALL RIGHT. 2, 2A AND 3 WILL BE ADMITTED OVER OBJECTION.

(PETITIONER'S EXHIBIT NOS. 2, 2A AND 3 WERE ADMITTED INTO EVIDENCE.)

MS. KENFIELD: THAT'S ALL I WANTED TO DO IN PREPARATION FOR THE STIPULATION, YOUR HONOR.

THE COURT: ALL RIGHT. YOU WISH TO VOIR DIRE YOUR CLIENT?

MS. BRICKLEY: YEAH.

VOIR DIRE EXAMINATION

BY MS. BRICKLEY:

Q. HODARI, YOU HAVE A RIGHT TO HAVE A TRIAL ON WHETHER OR NOT YOU

POSSESSED COCAINE; DO YOU UNDERSTAND THAT?

A. YES.

Q. IN FACT THAT'S WHAT WE'VE ALREADY DONE, PART OF THAT TRIAL, AND YOU HAVE A RIGHT TO CONTINUE IN THIS TRIAL AND YOU HAVE A RIGHT TO HAVE MYSELF AS YOUR LAWYER FURTHER CROSS-EXAMINE THE WITNESSES. DO YOU UNDERSTAND THAT?

A. UH-HUH.

Q. YOU HAVE TO SAY YES OR NO OUT LOUD.

A. YES.

Q. YOU ALSO HAVE A RIGHT TO PRESENT EVIDENCE ON YOUR OWN BEHALF ON YOUR OWN SIDE AT THAT HEARING; DO YOU UNDERSTAND THAT?

A. YES. MEANING WITNESSES.

Q. RIGHT. YOU ALSO HAVE A RIGHT TO REMAIN SILENT. THAT MEANS YOU DON'T HAVE TO SAY ANYTHING THAT COULD BE USED AGAINST YOU. YOU CAN SIT BACK AND SEE IF THEY CAN PROVE THIS OR NOT WITHOUT SAYING ANYTHING YOURSELF; DO YOU UNDERSTAND THAT?

A. YES.

Q. DO YOU UNDERSTAND THAT IF YOU ADMIT THIS WE WILL NOT CONTINUE WITH THIS TRIAL, SO THEREFORE THE DISTRICT ATTORNEY WILL NOT HAVE TO CONTINUE TO FINISH PROVING, AN ATTEMPT TO PROVE BEYOND A REASONABLE DOUBT THAT YOU HAD THIS COCAINE; DO YOU UNDERSTAND THAT?

A. YES.

Q. AND Y U UNDERSTAND THAT. IS THAT WHAT YOU WANT TO DO? ARE YOU WILLING TO GIVE UP THOSE RIGHTS THAT I'VE JUST EXPLAINED TO YOU?

A. I WILL.

Q. YOU REALIZE YOU'RE GIVING UP THOSE RIGHTS IF YOU DO THAT?

A. YES.

Q. HAS ANYBODY THREATENED YOU OR PROMISED YOU ANYTHING TO GET YOU TO ADMIT THIS?

A. WELL, WHEN I GOT CAUGHT HE SAID THAT I'LL BE GOING TO VISION QUEST.

Q. BUT I MEAN TODAY, HAS ANYBODY PROMISED YOU ANYTHING? DO YOU FEEL THAT IF YOU, THAT SOMEBODY TELLING YOU SOMETHING ABOUT VISION QUEST IS ANY WAY CONNECTED WITH YOUR ADMITTING THIS TODAY? DO YOU FEEL LIKE IF YOU ADMIT THIS --

A. NO, BUT IF I DIDN'T ADMIT IT I WAS TO GO ON THE STREETS AND IF HE SAW ME AGAIN, THE GUY, JERRY, HE WOULD BE MAD AT ME BECAUSE LAST TIME HE WAS HERE HE LOOKED AT ME REAL MEAN.

THE COURT: LET'S MAKE SURE THAT I FULLY UNDERSTAND WHERE YOU'RE COMING FROM. WHAT SHE'S ASKING YOU IS, YOU'RE SAYING TODAY YOU WISH TO ADMIT THAT YOU COMMITTED THESE OFFENSES?

THE MINOR: I ADMIT TO HAVING THE ONE ROCK IN MY POSSESSION.

THE COURT: THAT'S A CRIME. DO YOU UNDERSTAND IT'S AGAINST THE LAW TO POSSESS ANY COCAINE AT ALL?

THE MINOR: YES.

THE COURT: ANY ONE ROCK?

THE MINOR: (THE MINOR NODS HIS HEAD AND DOWN.)

THE COURT: NOW, WHAT YOU'VE JUST TOLD YOUR LAWYER IS YOU WANT TO ADMIT THAT.

THE MINOR: YES.

THE COURT: NOW, WHAT SHE IS ASKING YOU IS, ARE YOU ADMITTING THAT BECAUSE SOMEBODY PROMISED YOU SOMETHING IF YOU WOULD ADMIT IT? DID ANYBODY PROMISE YOU SOMETHING IF YOU WOULD ADMIT IT?

THE MINOR: NO.

THE COURT: DID ANYBODY THREATEN TO DO SOMETHING TO YOU IF YOU WOULD NOT ADMIT IT?

THE MINOR: NOT VERBALLY.

THE COURT: ANY KIND OF WAY DID ANYBODY THREATEN YOU TO DO SOMETHING UNLESS YOU ADMITTED THIS?

THE MINOR: NO. JUST BY HIS LOOKS.

THE COURT: BY ANYTHING. ARE YOU SAYING YOU'RE DOING IT BECAUSE OF SOME THREAT THAT SOMEBODY HAS MADE TO YOU?

THE MINOR: HIS LOOKS, YES.

THE COURT: THEN I WON'T ACCEPT AN ADMISSION.

MS. BRICKLEY: I THINK I DO KNOW. I DID NOTICE, JUST FOR THE RECORD, THAT THE POLICE OFFICER DURING HIS TESTIMONY WAS STARING AT --

CLIENT?

MS. BRICKLEY: -- AT THE MINOR IN A WAY WHICH COULD BE CONSTRUED AS --

CAN I JUST TALK TO HIM AGAIN? I WANT TO MAKE SURE THAT THAT IS IT.

(MS. BRICKLEY IS SPEAKING WITH THE MINOR.)

THE COURT: WE'LL PROCEED WITH THE HEARING THEN.

MS. BRICKLEY: THEN WE'LL CONTINUE WITH THE HEARING.

THE COURT: HE'S IN CUSTODY, RIGHT?

MS. BRICKLEY: YES.

THE COURT: ALL RIGHT. WE'LL CONTINUE IT OVER TO TOMORROW MORNING AT 10:00 O'CLOCK. 10:00 O'CLOCK TOMORROW MORNING FOR FURTHER HEARING.

(THEREUPON, THE PROCEEDINGS WERE ADJOURNED FOR THE DAY AND AND CONTINUED TO MAY 20, 1988.)

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FRIDAY, MAY 20, 1988 8:45 A.M.

---oOo---

THE COURT OFFICER: YOUR HONOR, THIS IS THE MATTER OF HODARI DULAN. IT'S CONTINUED FOR CONTESTED HEARING FROM YESTERDAY.

ARE YOU HODARI DULAN?

THE MINOR: YES.

THE COURT OFFICER: HODARI'S BEING REPRESENTED BY MISS BRICKLEY FROM THE P.D.'S OFFICE AND THE DISTRICT ATTORNEY'S OFFICE IS REPRESENTED BY MISS ANN KENFIELD.

THERE ARE NO FAMILY MEMBERS PRESENT.

THE COURT: HAD YOU RESTED, MISS KENFIELD?

MS. KENFIELD: NO, YOUR HONOR. THE COURT HAD DENIED THE MOTION TO SUPPRESS EVIDENCE AND THE MATTER WAS CONTINUED TODAY FOR FURTHER HEARING.

THE COURT: YES. I THOUGHT YOU HAD PUT ON ALL OF YOUR EVIDENCE.

MS. KENFIELD: NO. I JUST HAD SOME ITEMS MARKED IN THE ANTICIPATION OF A POSSIBLE STIPULATION SO THE COURT WOULD HAVE THEM IN THE COURT'S EVIDENCE --

THE COURT: ALL RIGHT.

MS. KENFIELD: -- FOR POSSIBLE DISPOSAL.

THE COURT: YOU MAY CONTINUE.

MS. KENFIELD: THANK YOU. I WOULD FIRST ASK FOR STIPULATION THAT THE EVIDENCE RECEIVED IN THE 700.1, THE

TESTIMONY RECEIVED IN THE 700.1 BE CONSIDERED FOR THE JURISDICTIONAL HEARING.

MS. BRICKLEY: SO STIPULATED.

THE COURT: ALL RIGHT. THE RECORD WILL SO SHOW.

MS. KENFIELD: PETITIONER WOULD RE-CALL OFFICER PERTOSO.

THE COURT: HE OUGHT TO REMEMBER TO TELL THE TRUTH.

OFFICER, PERTOSO, YOU'VE BEEN PREVIOUSLY SWORN. YOU'RE STILL UNDER OATH, STILL SWORN TO TELL THE TRUTH.

THE WITNESS: OKAY.

JERRY PERTOSO,

RESUMED THE WITNESS STAND AND TESTIFIED FURTHER AS FOLLOWS:

DIRECT EXAMINATION

BY MS KENFIELD:

Q. SHOWING YOU 1A, OFFICER PERTOSO, DO YOU RECOGNIZE THAT?

A. THIS IS THE SAME SUSPECTED ROCK COCAINE THAT MR. DULAN DISCARDED THE DAY HE WAS ARRESTED.

Q. AFTER HE DISCARDED IT, THE ROCK OF COCAINE, YOU DETAINED HIM; IS THAT CORRECT?

A. YES.

Q. AND YOU PLACED HIM UNDER ARREST?

A. YES.

Q. PURSUANT TO THAT ARREST DID

YOU SEARCH HIM?

A. YES.

Q. DID YOU RECOVER ANYTHING OF -- THAT YOU CONSIDERED OF EVIDENTIARY SIGNIFICANCE?

A YES.

Q. WHAT DID YOU RECOVER?

A. I RECOVERED SOME U.S. CURRENCY. I THINK IT WAS $130 AND A PAGER.

Q. SHOWING YOU WHAT HAS BEEN MARKED AS, ALREADY MARKED AS PETITIONER'S 2A, AN ENVELOPE CONTAINING A PAGER, DO YOU RECOGNIZE THAT?

A. THIS IS THE SAME PAGER THAT MR. DULAN HAD THE DAY HE WAS ARRESTED, ON HIS LEFT WAISTBAND.

Q. WHAT DID YOU DO WITH THE PAGER?

A. GAVE IT TO MY PARTNER, OFFICER MCCOLGIN, TO TURN INTO PROPERTY.

Q. WITH RESPECT TO THE ROCK OF COCAINE THAT YOU SAW THE MINOR DROP, WHAT DID YOU DO WITH THAT?

A. I ALSO GAVE IT TO MY PARTNER AND HE TURNED IT INTO THE CRIMINALISTIC SECTION AT THE END OF OUR SHIFT THAT EVENING.

Q. SHOWING YOU WHAT HAS BEEN MARKED AS PETITIONER'S GROUP EXHIBIT 3, DO YOU RECOGNIZE THAT MONEY?

A. WELL, NOT REALLY BUT OTHER THAN THE FACT IT CAME OUT OF THAT ENVELOPE.

Q. HANDING YOU PETITIONER'S 2 -- 3. EXCUSE ME. STRIKE 2. HANDING YOU PETITIONER'S NUMBER 3, DO YOU RECOGNIZE THAT?

A. YES. THIS IS THE SAME MONEY ENVELOPE THAT WE PLACED THE CURRENCY IN THAT WAS RECOVERED FROM MR. DULAN THE DAY HE WAS ARRESTED.

Q. AND DID YOU INDICATE THE AMOUNTS AND THE DENOMINATIONS?

A. MY PARTNER DID.

Q. AND WERE YOU PRESENT WHEN HE DID THAT?

A. YES.

MS. KENFIELD: NO FURTHER QUESTIONS.

THE COURT: CROSS.

MS. BRICKLEY: NO QUESTIONS.

THE COURT: MAY THE WITNESS BE EXCUSED?

MS. KENFIELD: YES.

THE COURT: THE WITNESS IS EXCUSED. THANK YOU.

THE WITNESS: THANK YOU.

(WHEREUPON, THE WITNESS WAS EXCUSED.)

MS. KENFIELD: PETITIONER'S NEXT WITNESS WILL BE RE-CALLING OFFICER MCCOLGIN.

THE COURT: OFFICER MCCOLGIN, YOU'RE STILL UNDER OATH, STILL SWORN TO TELL THE TRUTH. JUST HAVE A SEAT, PLEASE.

BRIAN MCCOLGIN,

RESUMED THE WITNESS STAND AND TESTIFIED FURTHER AS FOLLOWS:

DIRECT EXAMINATION

BY MS. KENFIELD:

Q. OFFICER MCCOLGIN, AFTER YOU RESPONDED TO OFFICER PERTOSO'S REPORT AND YOU RESPONDED TO WHERE HE HAD THIS MINOR IN CUSTODY, DID HE GIVE YOU ANYTHING?

A. YES.

Q. WHAT DID HE GIVE YOU?

A. HE GAVE ME A SMALL WHITE CHUNK OF SUSPECTED ROCK COCAINE.

Q. HANDING YOU PETITIONER'S 1, DO YOU RECOGNIZE THAT?

A. YES, I DO.

Q. WHAT IS THAT?

A. THIS IS THE SMALL ROCK, SMALL CHUNK OF SUSPECTED COCAINE THAT WAS GIVEN ME BY OFFICER PERTOSO.

Q. WHAT DID YOU DO WITH IT?

A. I PLACED IT IN THIS CLEAR ZIP-LOCK BAG. I PLACED MY SERIAL NUMBER ON THE OUTSIDE OF THE BAG, 7465 P. I THEN PLACED IT IN A CRIMINALISTIC'S ENVELOPE AND IT WAS LATER TURNED INTO THE CRIMINALISTIC'S SECTION AT THE OAKLAND POLICE DEPARTMENT.

Q. HANDING YOU PETITIONER'S NUMBER 1, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS THE YELLOW CRIMINALISTIC'S ENVELOPE THAT I PLACED THE SUSPECTED COCAINE IN.

Q. AND YOU PLACED BOTH PETITIONER'S 1A INTO IT AND THEN SOME OTHER ROCK COCAINE, SUSPECTED ROCK COCAINE THAT YOU FOUND?

A. YES.

Q. AND DID YOU SEAL THAT ENVELOPE?

A. YES, I DID.

Q. DIRECTING YOUR ATTENTION TO THE BACK, ARE YOUR SEALS STILL INTACT?

A. YES.

Q. AND DID YOU TURN THAT ENVELOPE IN ANYWHERE?

A. YES.

Q. TO THE CRIMINALISTIC SECTION AT THE OAKLAND POLICE DEPARTMENT.

Q. BETWEEN THE TIME YOU SEALED IT AND THE TIME THAT YOU TURNED IT IN, WAS IT IN YOUR POSSESSION THAT NIGHT?

A. YES.

Q. DID YOU RECEIVE ANYTHING ELSE FROM OFFICER PERTOSO?

A. YES.

Q. WHAT?

A. I RECEIVED $130 IN CASH AND A BEEPER.

Q. WHAT DID YOU DO WITH THE $130

IN CASH?

A. IT WAS TURNED INTO THE PROPERTY SECTION AT THE OAKLAND POLICE DEPARTMENT.

Q. HANDING YOU WHAT HAS BEEN MARKED AS PETITIONER'S NUMBER 3, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS A MONEY ENVELOPE AND INSIDE IS WHAT I PLACED THE – INSIDE IT I PLACED THE CURRENCY THAT WAS RECOVERED FROM THE DEFENDANT.

Q. AND HANDING YOU THE CONTENTS, THE CURRENCY, DO YOU RECOGNIZE THAT?

A. YES.

Q. AND WHAT DOES THAT APPEAR TO BE?

A. IT'S CASH. U.S. CURRENCY.

Q. AND DOES THAT APPEAR TO BE THE CURRENCY THAT YOU PLACED IN IT AFTER OFFICER PERTOSO GAVE IT TO YOU ON APRIL 18TH?

A. YES.

Q. AND DID YOU BRING THAT TO COURT YESTERDAY?

A. YES, I DID.

Q. WAS IT IN A SEALED CONDITION WHEN YOU BROUGHT IT TO COURT?

A. YES.

Q. HANDING YOU PETITIONER'S 2, DO YOU RECOGNIZE THAT?

A YES.

Q. WHAT IS THAT?

A. THIS IS A PROPERTY ENVELOPE AND THIS IS WHAT I PLACED THE PAGER IN THAT WAS RECOVERED FROM MR. DULAN.

Q. HANDING YOU 2A, DO YOU RECOGNIZE THAT?

A. YES.

Q. WHAT IS THAT?

A. IT'S A PAGER AND IT APPEARS TO BE THE SAME PAGER THAT I RECOVERED, WAS RECOVERED FROM MR. DULAN.

MS. KENFIELD: NO FURTHER -- ONE FURTHER.

Q. WHEN YOU TOOK PETITIONER'S 1 AND ITS CONTENTS AT THE END OF YOUR SHIFT, WHERE DID YOU PUT IT?

A. IN A LOCKED BOX.

Q. THAT WOULD BE THE LOCKED EVIDENCE DEPOSITORY BOX AT THE OAKLAND POLICE DEPARTMENT CRIME LAB?

A. YES.

MS. KENFIELD: THANK YOU. NO FURTHER QUESTIONS.

THE COURT: CROSS?

MS. BRICKLEY: NO QUESTIONS.

THE COURT: MAY THE WITNESS BE EXCUSED?

MS. KENFIELD: YES.

THE COURT: THE WITNESS IS EXCUSED.

(WHEREUPON, THE WITNESS IS EXCUSED.)

MS. KENFIELD: YOUR HONOR, I WOULD NOW OFFER THE FOLLOWING STIPULATION: THAT IF CALLED, LANSING J. LEE WOULD QUALIFY AS A CRIMINALIST CAPABLE OF ANALYZING SUSPECTED CONTROLLED SUBSTANCES AND GIVING HIS OPINION AS TO WHAT THEY ARE;

THAT ON MAY 9TH, 1988, HE RECEIVED PETITIONER'S NUMBER 1 FROM OAKLAND POLICE DEPARTMENT EVIDENCE DEPOSITORY IN A SEALED CONDITION; THAT HE OPENED PETITIONER'S NUMBER 1 AND FOUND IT TO CONTAIN A SMALL ZIP-LOCK PLASTIC BAGGIE WHICH HAS BEEN MARKED PETITIONER'S 1A. HE ALSO FOUND IT TO CONTAIN ONE KNOTTED PLASTIC BAG CONTAINING WHITE CHUNKY MATERIAL AND SMALLER ZIP-LOCK BAGS, EACH CONTAINING WHITE CHUNKY MATERIAL, WHICH HAS BEEN MARKED PETITIONER'S 1B;

THAT HE ANALYZED PETITIONER'S 1A AND IDENTIFIED IT AS CONTAINING COCAINE BASE AS IN HEALTH AND SAFETY CODE SECTION 11054(f)(1) AND FOUND THAT MATERIAL TO WEIGH .60 GRAMS. HE THEN RE-PACKAGED, RE-SEALED THE ITEMS AND PLACED THEM INTO EVIDENCE, PLACED THEM BACK INTO THE OAKLAND POLICE DEPARTMENT NARCOTICS LAB.

THE COURT: IS THAT STIPULATION ACCEPTED?

MS. BRICKLEY: YES, IT IS.

THE COURT: THE RECORD WILL SO SHOW.

MS. KENFIELD: PETITIONER WOULD MOVE 1 AND 1A INTO EVIDENCE.

THE COURT: ALREADY IN EVIDENCE, AREN'T THEY?

THE CLERK: THEY'RE ALREADY IN EVIDENCE.

THE COURT: IN ANTICIPATION OF THE ADMISSION I THINK IS WHEN YOU MOVED THEM.

MS. KENFIELD: I THOUGHT I HAD ONLY MOVED 2 AND 3-A IN BUT ....

THE COURT: 1 AND 1A ARE ADMITTED IN EVIDENCE.

(PETITIONER'S EXHIBIT NOS. 1 AND 1A WERE ADMITTED INTO EVIDENCE.)

THE COURT: NEXT.

MS. KENFIELD: PETITIONER RESTS.

THE COURT: ALL RIGHT, MISS BRICKLEY.

MS. BRICKLEY: NO EVIDENCE.

THE COURT: ARGUMENT.

MS. KENFIELD: WAIVE OPENING.

THE COURT: ARGUMENT.

MS. BRICKLEY: THE MATTER IS SUBMITTED.

THE COURT: THE COURT IS CONVINCED BEYOND A REASONABLE DOUBT OF THE TRUTH OF THE ALLEGATIONS IN BOTH THE SUBSEQUENT PETITION AS CHARGED AND IN THE SUPPLEMENTAL PETITION, SUPPLEMENTAL PETITION OR AS IT ALLEGES THE COMMISSION OF THE NEW OFFENSE, BOTH BEYOND A REASONABLE DOUBT.

WHAT IS THE RECOMMENDATION OF THE PROBATION DEPARTMENT REGARDING THE CUSTODY OF THIS MINOR PENDING DISPOSITION?

THE COURT OFFICER: WE RECOMMEND DETENTION, YOUR HONOR.

THE COURT: COUNSEL WISH TO BE HEARD?

MS. BRICKLEY: I WOULD SUBMIT THAT MATTER AS WELL.

MS. KENFIELD: SUBMITTED.

THE COURT: THE MINOR WILL REMAIN IN CUSTODY PENDING DISPOSITION. THE MATTER WILL GO OVER TWO WEEKS FOR DISPOSITION TO --

THE CLERK: JUNE 3RD AT 8:45 A.M. ONE MOMENT, YOUR HONOR. JUNE 6TH AT 8:45 A.M.

THE COURT: THE MATTER WILL GO OVER TO JUNE 6TH 8:45 A.M. IN THIS DEPARTMENT FOR HEARING -- STRIKE THAT -- FOR DISPOSITION.

THE MINOR AND HIS PARENT OR PARENTS ARE ORDERED BACK AT THAT TIME, JUNE 6TH AT 8:45.

MS. BRICKLEY: JUST FOR THE COURT'S INFORMATION, HODARI'S MOTHER WAS HERE EARLIER BUT BECAUSE OF HER WORK SCHEDULE SHE WAS UNABLE TO STAY AND SHE'S GOING TO CALL ME TODAY.

THE COURT: VERY GOOD. THANK YOU.

(THEREUPON, THE PROCEEDINGS WERE ADJOURNED FOR THE DAY AND CONTINUED TO JUNE 6, 1988.)

MONDAY, JUNE 6, 1988 8:45 A.M.

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THE COURT OFFICER: THIS IS THE MATTER OF HODARI DULAN. THE MINOR IS PRESENT. HE'S REPRESENTED BY MISS KATHY SIEGEL OF THE PUBLIC DEFENDER'S OFFICE.

REPRESENTING THE DISTRICT ATTORNEY'S OFFICE IS MR. HARRY MURPHY.

ALSO PRESENT WITH HODARI IS, ARE YOU HIS MOTHER, MRS. PAULETTE ROBINSON?

THE MINOR'S MOTHER: YES.

THE COURT OFFICER: YOU ARE --

THE MINOR'S SISTER: HIS SISTER.

THE MINOR'S MOTHER: THAT'S MY DAUGHTER, NIARI DULAN.

THE COURT OFFICER: THANK YOU.

THE MATTER'S ON THE CALENDAR FOR DISPOSITION. THE FINDINGS AFTER HEARING WERE TO POSSESSION OF COCAINE AND PROBATION VIOLATION.

THE RECOMMENDATION OF THE PROBATION DEPARTMENT IS THAT THE COURT FIND THAT REASONABLE EFFORTS HAVE BEEN MADE TO PREVENT OR ELIMINATE THE NEED TO REMOVE THE MINOR FROM HIS HOME AND TO MAKE IT POSSIBLE FOR HIM TO RETURN HOME.

WE'RE ASKING THAT THE COURT FIND THAT THE MINOR WAS TRIED ON PROBATION AND FAILED TO REFORM. WE'RE ASKING THAT THE PREVIOUS ORDER, WITH THE EXCEPTION OF ANY PRIOR RESTITUTION OR RESTITUTION FINE ORDERS, BE SET ASIDE AND A NEW ORDER MADE COMMITTING THE MINOR'S CARE, CUSTODY AND CONTROL TO THE PROBATION OFFICER, WITH THE MINOR

TO BE PLACED IN A SUITABLE COUNTY FACILITY WITH LOS CERROS APPROVED FOR PLACEMENT UNDER THE STANDARD OUT OF HOME PROBATION CONDITIONS.

WE'D ALSO ASK IN THIS CASE FOR THE DRUG CONDITIONS WHICH WOULD BE THAT HE MAINTAIN A 10:00 P.M. CURFEW WHEN IN THE COMMUNITY UNLESS GIVEN PERMISSION BY HIS MOTHER AND THE PROBATION OFFICER IN ADVANCE TO REMAIN OUT LATER.

WE'RE ASKING THAT HE BE ORDERED TO SUBMIT TO DRUG TESTING IF DIRECTED TO DO SO BY THE PROBATION OFFICER; THAT HE BE ORDERED NOT TO ASSOCIATE WITH ANYONE HE KNOWS TO USE, DEAL OR POSSESS ILLEGAL DRUGS; THAT HE NOT HAVE IN HIS POSSESSION ANY BEEPER OR TELEPHONE PAGER; IN ADDITION TO HAVE NO DRUGS AND SEARCH ARE THE STANDARD OUT OF HOME PROBATION CONDITIONS.

WE'RE ALSO RECOMMENDING A RESTITUTION FINE OF $25 -- EXCUSE ME -- $130, AND THAT THE MONEY BE RELEASED FROM -- THAT THE MONEY BE RELEASED TO THE PROBATION OFFICER. I HAVE NOT -- I DON'T' KNOW IF IT'S IN EVIDENCE OR IF IT'S STILL BEING HELD BY THE POLICE DEPARTMENT. WE'D ASK THAT OF THAT MONEY $25 BE A RESTITUTION FINE AND $105 A FINE TO THE GENERAL FUND.

THE COURT: THE RECOMMENDATION THEN IS A 25 DOLLAR RESTITUTION FINE AND 105 DOLLAR GENERAL FINE?

THE COURT OFFICER: YES.

THE COURT: THE COURT HAS REVIEWED THIS REPORT AND IS INCLINED TO ADOPT THE RECOMMENDATION AS STATED BY THE COURT OFFICER. THAT INCLINATION IS SUBJECT TO THE VIEWS OF COUNSEL. COUNSEL WISH TO BE HEARD?

MS. SIEGEL: HODARI, IS THERE ANYTHING THAT YOU WANT TO SAY TO THE JUDGE AT THIS POINT ABOUT THE RECOMMENDATION?

THE MINOR: THE RECOMMENDATION OF LOS CERROS?

MS. SIEGEL: YES.

THE MINOR: I WANTED TO KNOW IF I COULD GO TO CHABOT INSTEAD OF LOS CERROS.

THE COURT: HOW OLD ARE YOU?

THE MINOR: IF THERE WAS A CHANCE.

THE COURT: HOW OLD ARE YOU?

THE MINOR: 17 NOW.

THE COURT: YOU'RE OF THE AGE WHERE WE SEND YOU WITH THE OLDER BOYS. CHABOT IS FOR THE YOUNGSTERS WHO ARE UNDER 16.

MS. SIEGEL: MA'AM, IS THERE ANYTHING THAT YOU WANTED TO SAY TO THE COURT?

THE MINOR'S MOTHER: NO.

MS. SIEGEL: I WOULD SUBMIT IT, YOUR HONOR.

THE COURT: IS THE MATTER SUBMITTED?

MR. MURPHY: YES.

THE COURT: THE COURT ADOPTS AS ITS OWN EACH OF THE FINDINGS AS WERE JUST RECOMMENDED BY THE PROBATION OFFICER.

THIS MINOR IS CONTINUED AS A

WARD OF THE COURT UNDER EACH ONE OF THE CONDITIONS AS WAS JUST STATED BY THE COURT OFFICER.

AND THE COURT CLERK IS ORDERED TO RELEASE THE $130 WHICH WAS CONFISCATED FROM THE MINOR AND IS IN EVIDENCE, RELEASE THAT TO THE PROBATION OFFICER FOR APPLICATION TO THE RESTITUTION FINE AND THE GENERAL FINE AS ORDERED BY THE COURT.

THE MAXIMUM TIME THAT HE MAY BE HELD IN CUSTODY IS, MR. D.A.?

MR. MURPHY: SORRY. THREE YEARS AND -- FIVE YEARS, EIGHT MONTHS MAXIMUM.

THE CLERK: FIVE YEARS, EIGHT MONTHS.

THE COURT: THAT'S THE MAX. I'M SENDING YOU TO CAMP. I'M NOT SENDING YOU TO Y.A. IF I WERE SENDING YOU TO Y.A. YOU WOULD BE LOOKING AT A SUBSTANTIAL PART OF THAT FIVE YEARS, EIGHT MONTHS.

THE CAMP PROGRAM AVERAGE IS ABOUT SIX MONTHS. AFTER YOU'VE BEEN IN IT FOR FOUR TO SIX WEEKS YOU CAN START, IF YOUR CONDUCT IS APPROPRIATE, START EARNING YOUR RIGHT TO SPEND YOUR WEEKENDS AT HOME, BUT YOU'VE GOT TO EARN THOSE EVERY WEEKEND.

ALL RIGHT. THAT WILL BE THE ORDER.

AND THE MATTER WILL GO OVER TWO WEEKS FOR PLACEMENT REVIEW TO --

THE CLERK: JUNE 20TH AT 8:45.

THE COURT: IT IS SO ORDERED. THE COURT FINDS THE 11350 WAS A STIPULATION. WAS THE 777 CONTESTED?

MS. SIEGEL: YOUR HONOR, THERE WAS A 700.1 ON THE 19TH AND THAT WAS DENIED. AND THEN MY FILE INDICATES THAT ON THE 20TH THERE WAS A FINDING OF 11350 AND 777(a).

MR. MURPHY: THE 777(a) WAS AN 11352.

THE COURT: APPARENTLY THIS WAS NOT A STIPULATION.

ALL RIGHT, HODARI, YOU HAVE THE RIGHT TO APPEAL THIS MATTER IF YOU WISH. DO YOU UNDERSTAND WHAT IS MEANT WHEN I TELL YOU THAT YOU HAVE THE RIGHT TO APPEAL?

THE MINOR: YES.

THE COURT: ALL RIGHT. YOU UNDERSTAND THAT YOU'RE NOT REQUIRED TO APPEAL BUT YOU HAVE THE RIGHT TO DO SO IF YOU WANT TO?

IF YOU DO WANT TO APPEAL YOU MUST FIRST FILE A WRITTEN NOTICE OF APPEAL WITH THE COURT WITHIN 60 DAYS OF TODAY. IF YOU DON'T WANT TO APPEAL YOU DON'T HAVE TO FILE ANYTHING.

IF YOU WANT TO APPEAL AND WANT TO BE REPRESENTED BY A LAWYER ON THE APPEAL BUT CAN'T GET A LAWYER BECAUSE YOU DON'T HAVE ENOUGH MONEY TO HIRE ONE, YOU TELL THAT TO THE COURT IN WRITING, AND IF THE COURT FINDS IT TO BE TRUE, THE COURT WILL THEN APPOINT A LAWYER TO REPRESENT YOU ON THE APPEAL AND YOU WON'T HAVE TO PAY THAT LAWYER YOURSELF.

DO YOU UNDERSTAND THAT?

THE MINOR: YES.

THE COURT: ALL RIGHT. THE ORDER WILL BE AS STATED.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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HODARI DULAN - 141401*02 05/19/88 25 90

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA - JUVENILE COURT

WILMONT SWEENEY, JUDGE DEPT.: 25
LOUISE R. MORIEGA, CLERK DATE : 05/19/88
FANCINA KIDD, COURT REPORTER
COURT OFFICER: EWING/MARQUART
PROBATION OFFICER: SIMMS

IN THE MATTER OF: ORDER (602 W&I CODE)

HODARI DULAN, A MINOR
BORN: 06/05/71 NUMBER: 141401

PARTIES PRESENT: MINOR; MOTHER.
COURT ATTACHES: DDA AN KENFIELD; APD JANICE BRICKLEY, CNSL FOR MINOR

THE MATTER COMES BEFORE THE COURT FOR: FURTHER HEARING ON 700.1 MOTION AND ON SUB & SUPPL PETNS FILED 04/20/88 CONTINUED FROM 05/12/88. CT 1 11350 H&S-F STILL PENDING; CT SUPPLE 777A W&I-M STILL PENDING.

COUNSEL'S POINTS AND AUTHORITIES ARE RECEIVED AND REVIEWED.

MINOR'S 700.1 MOTION IS ARGUED AND SUBMITTED.

EXHIBITS MARKED FOR IDENTIFICATION OR ADMITTED INTO EVIDENCE ARE LISTED ON THE EXHIBIT RECORD ON FILE HEREIN.
SPECIAL EXHIBITS: PETITIONER'S #1A & 1B=ROCK COCAINE, PETITIONER'S #3-US CURRENCY = TOTAL $130.00

THE COURT FINDS THAT:

THE COURT FINDS THAT:

MINOR'S 700.1 MOTION IS DENIED.

THE MINOR IS ORDERED TO RETURN TO THE COURTROOM.

PARENT ORDERED TO RETURN.

CONTINUED TO: 05/20/88 IN DEPARTMENT 25 AT 08:45AM FOR FURTHER HEARING TO BE HEARD AT 10:00AM).

REFEREE JUDGE OF THE JUVENILE COURT

CCS:
( )MINOR ( ) PARENT ( ) CSL
(X)PO ( ) PD ( ) DA
( )DMV

HODARI DULAN - 141401*02 05/20/88 25 89
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA - JUVENILE COURT

WILMONT SWEENEY, JUDGE DEPT: 25
LOUISE R. NORIEGA, CLERK DATE: 05/20/88
FRANCINA KIDD, COURT REPORTER
COURT OFFICER: MARQUART/CORTLUND
PROBATION OFFICER: SIMMS

IN THE MATTER OF: ORDER (602 W&I CODE)

HODARI DULAN, a minor Born: 06/05/71
Number: 141401

Parties present: MINOR.
Court attaches: APD JANICE BRICKLEY, CNSL FOR MINOR; DDA ANN KENFIELD.

THE MATTER COMES BEFORE THE COURT FOR: FURTHER HEARING ON SUB & SUPPL PETNS FILED 04/20/88 - (TO BE HEARD AT 10:00 AM) - CONTINUED FROM 05/19/88. CT 1 11350 H&S-F STILL PENDING; CT SUPPLE 777A W&I-M STILL PENDING.

STIPULATION THAT TESTIMONY ADMITTED INTO EVIDENCE IN RE HEARING ON 700.1 MOTION IS TO BE ADMITTED FOR THE CASE-IN-CHIEF.

WITNESSES SWORN ON BEHALF OF THE PETITIONER IN RE CASE-IN-CHIEF: OFR. JERRY PERTOSO, OAKLAND POLICE DEPARTMENT (RESUMES); OFR. BRIAN MC COLGIN, OAKLAND POLICE DEPARTMENT (RESUMES).

EXHIBITS MARKED FOR IDENTIFICATION OR ADMITTED INTO EVIDENCE ARE LISTED ON THE EXHIBIT RECORD ON FILE HEREIN.

THE COURT FINDS THAT:
(x) NOTICE has been given as required by law; the BIRTHDATE and county of RESIDENCE of minor has been determined.
CT 1 (FM 05/20/88), 11350 H&S-F, TRUE AS ALLEGED; CT SUPPLE (FM 05/20/88), 777A W&I-M, TRUE AS ALLEGED.

THE COURT ORDERS THAT:
Minor is to be detained at Juvenile Hall. (PENDING DISPOSITION)

The minor is ordered to return to the courtroom.

_____

_____

Continued to: 06/06/88 in Department 25 at 08:45 AM for DISPOSITION.

_____
Referee Judge of the Juvenile Court

CCs:
( ) Minor ( ) Parent ( ) CSL
(x) PO ( ) PD ( ) DA
( ) DMV

**FILED ALAMEDA COUNTY JUNE 9, 1988 -
RENE C. DAVIDSON, COUNTY CLERK**

HODARI DULAN - 141401*02 06/06/88 25 25

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA - JUVENILE COURT

WILMONT SWEENEY, JUDGE DEPT: 25
FRANCIS MICHEL, CLERK DATE: 06/06/88
FRANCINA KIDD, COURT REPORTER
COURT OFFICER: KAY EWING
PROBATION OFFICER: SIMMS

IN THE MATTER OF: ORDER (602 W&I CODE)

HODARI DULAN, a minor
Born: 06/05/71 Number: 141401

Parties present: MINOR; MOTHER; SISTER.
Court attaches: APD KATHY SIEGEL; DDA HARRY MURPH.

THE MATTER COMES BEFORE THE COURT FOR: DISPOSITION ON SUB & SUPPL PETNS FILED 04/20/88 CONTINUED FROM 05/20/88. CT 1 (FM 05/20/88) 11350 H&S-F, TRUE AS ALLEGED; CT SUPPLE (FM 05/20/88) 777A W&I-M, TRUE AS ALLEGED.

THE COURT FINDS THAT:

CT 1 (FM 05/20/88), 11350 H&S-F, TRUE AS ALLEGED; CT SUPPLE (FM 05/20/88), 777A W&I-M, TRUE AS ALLEGED.

THE COURT ORDERS THAT:
Minor is continued a ward of the court.
Minor has been tried on probation in the physical custody of a parent or guardian and has failed to reform.
Reasonable efforts have been made to prevent or eliminate the need for removal of the minor from his/her home and to make it possible for the child to return to his/her home and continuance in the home is contrary to the minor's welfare.

Present order is set aside. THE COURT MAKES A NEW ORDER.

Committed to the care, custody and control of the Probation Officer to be placed in a suitable foster home or private institution or group home/county facility WITH LOS CERROS A COUNTY FACILITY APPROVED FOR PLACEMENT.

Additional terms and conditions of probation as subsequently listed are made a part of this order and incorporated herein.

MINOR IS NOT TO USE/POSSESS ANY NARCOTICS, DRUGS, OR OTHER CONTROLLED SUBSTANCES, RELATED PARAPHERNALIA OR POISONS UNLESS PRESCRIBED BY A PHYSICIAN.

MINOR IS NOT TO USE/POSSESS BEEPER (PAGER), OR OTHER REMOTE ELECTRONIC COMMUNICATION DEVICE.

THE MINOR IS NOT TO ASSOCIATE WITH PERSONS HE KNOWS TO USE/POSSESS/DEAL ILLEGAL DRUGS.

MINOR IS TO OBSERVE A CURFEW EVERY NIGHT UNLESS RECEIVING THE PRIOR PERMISSION OF BOTH THE PROBATION OFFICER AND THE PARENT/CUSTODIAN TO STAY OUT LATER.

MINOR TO SUBMIT PERSON VEHICLE PROPERTY UNDER HIS/HE CONTR OR ROOM TO SEARCH BY ROL, OR ROOM TO SEARCH BY A PROBATION OFFICER, POLICE OFFICER OR LAW ENFORCEMENT OFFICIAL WITH OR WITHOUT A SEARCH WARRANT AT ANY TIME OF THE DAY OR NIGHT.

MINOR IS TO SUBMIT TO URINALYSIS OR ANY OTHER TEST FOR USE OF NARCOTICS OR OTHER CONTROLLED SUBSTANCES AS DIRECTED BY THE PROBATION OFFICER.

MINOR IS TO COOPERATE WITH THE PROBATION OFFICER IN ANY PROGRAM OF GUIDANCE COUNSELING OR THERAPY

ADDRESSING THE ISSUE OF SUBSTANCE ABUSE.

Minor pay to the General Fund of Alameda County $105.00

Minor pay to the State Restitution Fund $25.00

Minor advised maximum period of confinement is 5 YEARS AND 8 MONTHS.

THE CLERK IS ORDERED TO RELEASE THE MONIES IN EVIDENCE $135.00 TO THE PROBATION OFFICER, TO BE APPLIED TO THE FINES IMPOSED. ANY PREVIOUS RESTITUTION ORDERS ARE TO REMAIN IN FULL FORCE AND EFFECT.

Minor is advised of right to appeal.

Minor is to be detained at Juvenile Hall.

Continued to: 06/20/88 in Department 25 at 08:45 a.m. for PLACEMENT REVIEW.

Referee Judge of the Juvenile Court

CCs:
( ) Minor ( ) Parent ( ) CSL
(x) PO ( ) PD ( ) DA
( ) DMV

FILED ALAMEDA COUNTY, JUNE 13, 1988
RENE C. DAVIDSON, COUNTY CLERK

SUPERIOR COURT OF THE STATE CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, IN SESSION AS A JUVENILE COURT

In the matter of

Dept. No. 25

HODARI DULAN,

No. 141401

A Minor.

NOTICE OF APPEAL FROM FINDINGS, JUDGMENT AND DISPOSITIONAL ORDER

_____/

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that Hodari Dulan, appellant, a minor aged 16, in the above-entitled action, hereby appeals to the Court of Appeal of the State of California, in and for the First Appellate District, from the findings, judgment, and dispositional order herein entered in the above-entitled court on the 6th day of June, 1988, and from the whole of said findings judgment and said dispositional order.

DATED: June 6, 1988

_____
Hodari Dulan
Appellant in propria persona

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re HODARI D., a Person Coming Under the Juvenile Court Law.	
PEOPLE OF THE STATE CALIFORNIA, Plaintiff and Respondent, v. HODARI D., Defendant and Appellant.	A043060 (Alameda County Super.Ct.No. 141401)

Hodari D., a minor, appeals from the juvenile court's order finding that he was in possession of cocaine and that he violated the curfew restrictions of his probation. We determine that the court erred in failing to suppress evidence obtained as a direct result of illegal police activity, and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On April 18, 1988, at approximately 10 p.m., Officer McColgin and Pertoso, assigned to a special duty drug task force, were on patrol in the area of Foothill Boulevard and 63rd Avenue in Oakland. They drove an

unmarked brown Dodge, and both officers wore blue jeans, tennis shoes, and blue jackets with the word "police" on the front and back. As the officers turned south onto 63rd Avenue, they saw four or five young Black males standing around a small red compact car parked at the curb approximately 40 yards away. Two members of the group looked at the Dodge and almost immediately started running west toward an apartment complex. The red vehicle drove off quickly and the other two individuals ran south on 63rd Avenue toward an abandoned house next to the apartments.

The officers were familiar with the apartment complex as an area of high narcotic activity in which they had made several arrests. There was no information as to whether any convictions had resulted from the arrests. By the time the officers pulled up to where the red vehicle had been parked, all of the individuals were out of sight. The officers did not see their faces, nor did they see any exchange of drugs, money, or any other furtive movements, but they believed there was "some type of illegal [narcotics-related] activity" taking place.

Officer Pertoso got out of his car and ran back up 63rd Avenue, turning west on Foothill to cut

off the fleeing individuals to "find out who they were and what their purpose was for being there in the area." Officer McColgin drove around the block in the opposite direction, also attempting to stop the individuals. As Pertoso ran westbound along Foothill, he saw appellant running towards him, looking back over his shoulder. Pertoso and appellant continued to run until they were approximately 11 feet apart, when appellant turned forward, saw the officer, and looked startled. Appellant then made a scooping motion with his hand, and discarded a single loose rock on the sidewalk. Pertoso suspected the rock was cocaine.

Pertoso apprehended appellant, forced him to the grass, handcuffed him, and radioed McColgin. McColgin arrived on the scene and retraced the route back to where the officers had originally seen the group. He found a baggie containing 15 chunks of what later proved to be cocaine near the apartment complex.[1/]

On April 20, 1988, a subsequent petition under Welfare and Institutions Code section 602 was filed against appellant alleging possession of cocaine. (Health & Saf. Code, § 11350.) A supplemental

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1. In a search incident to the arrest, police discovered $130 in appellant's shoe and a pager.

petition alleged a curfew violation. (Welf. & Inst. Code, § 777, subd. (a).)

On May 2, 1988, appellant filed a motion to suppress all evidence seized as a result of his detention. (Welf. & Inst. Code § 700.1.) On May 19, the motion was denied. The court subsequently found the allegations of the petitions to be true.

At the dispositional hearing on June 6, appellant was ordered committed to Los Cerros Camp. A timely notice of appeal was filed on June 13, 1988.

DISCUSSION

On appeal, appellant challenges the court's suppression order, arguing that the cocaine should have been suppressed because the chase constituted a detention and the officers had no reasonable cause to detain appellant. Respondent argues that there was no detention until the officers caught appellant, and that absent an illegal police threat to search, as opposed to a threat to detain, appellant's discard of the cocaine is not a result of a threatened illegality.

The trial court's findings and reasoning were not entirely clear. The court stated: "I'm not concerned with the illegality of the chase on these facts. I think this was clearly illegal. The cops had no

reasonable basis for doing what they did in chasing him."[2/] The court's concern was with the issue of whether, granting the initial illegality, "[A]m I required to find that anything that was disposed of . . . that's suppressible?" The trial court found it illogical that discarded evidence should be suppressed, even though the court felt that the evidence would have been suppressed if appellant left it in his pocket and the police discovered it during a search following appellant's apprehension. It appears that the court's main concern was with the nexus between the illegality and the evidence, rather than the issue of whether there was illegal police conduct. We approach the issue as a three-part inquiry into whether a detention occurred, if there was reasonable cause for detention, and whether

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2. The trial court noted that there was no "actual detention" until after appellant discarded the rock. The court was distinguishing between threatened detentions and actual, physical detentions. The court also stated, however, that the police had no right to chase appellant or to detain him. Under the facts of this case, as compared to cases in which an officer merely follows a suspect, we find there was an actual detention, for Fourth Amendment purposes, when the officer confronted appellant head on at a run, as at that point, the officer communicate an intent to capture or block appellant's freedom of movement. (Michigan v. Chesternut (1988) 486 U.S. ___, ___ [108 S.Ct. 1975, 1980].)

abandonment of the evidence was a direct result of an illegal detention.

Was There a Detention?

We apply federal law, but utilize state law where it does not conflict with federal law in evaluating the issues involved. (In re Lance W. (1985) 37 Cal.3d 873.) In reviewing a motion to suppress, we accept the factual finding of the trial court which are supported by substantial evidence, but we independently determine whether the facts conform to the constitutional standards of reasonableness. (People v. Leyba (1981) 29 Cal.3d 591, 596-597.) Since only the police officers testified in this case, the facts are undisputed.

Both parties correctly cite Michigan v. Chesternut, supra, 486 U.S. ___ [108 S.Ct. 1975] as the most recent Supreme Court case analyzing when police conduct constitutes a detention. In Chesternut, officers in a patrol car observed a man get out of a car and approach the defendant. When defendant saw the officers, he turned and ran. The patrol car followed, "'to see where he was going.'" As the car drove alongside, defendant discarded several packets containing codeine. (Id., 108 S.Ct. at p. 1977.)

The court noted it would "leave to another

day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980, fn. 9.) The court also declined to adopt a rule that "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." (Id., at p. 1979.) Instead, the court reaffirmed the test of United States v. Mendenhall (1980) 446 U.S. 544, that "the police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' [Citations]." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1979.) The test is designed to "assess the coercive effect of police conduct, taken as a whole, ..." (Ibid.)

In evaluating the facts of Chesternut, the Supreme Court noted that the police conduct in that case "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980.) There was no use of siren or flashers, no command to halt, and no

operation of the police car to block the suspect's course, "or otherwise control the direction or speed of his movement." (Ibid.) The court also noted that mere surveillance or approach by an officer is not a seizure. (Id., at pp. 1980-1981.) The court left open the question of when police pursuit would constitute a seizure. (Id., at p. 1980, fn. 9.)

In the instant case, appellant alludes to the coercive nature of the police action of engaging in an aggressive foot chase to cut off his flight and of sending an officer in each direction. Of course, appellant had disappeared by the time Officer Pertoso got out of the car, and thus had no knowledge of this police pincer maneuver. In fact, appellant never saw Officer McColgin until after he was under arrest. Police conduct of which the suspect is unaware is not relevant to a Fourth Amendment analysis. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980, fn. 7.) The only police conduct with which we are concerned in the instant case is that of Officer Pertoso as he ran up Foothill Boulevard toward appellant, from the time appellant, who was also running, looked forward and saw the officer running directly at him.

We have no doubt that it is coercive and

intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk. Indeed, the sight of a running officer, even without a command to halt, would reasonably convince most citizens that they were not free to ignore the officer and leave. We disagree with the trial court that there was no detention until the officer physically gained control of the suspect. This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of Chesternut, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or "otherwise control the direction or speed" of one's movement. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980.)

California cases and federal cases have held that giving chase "in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention." (People v. Washington (1987) 192 Cal.App.3d 1120, 1126; People v. Menifee (1979) 100 Cal.App.3d 235, 239 [officer's rapid pursuit of suspects who knew the officers could be reasonably viewed as an intended detention]; United States v. Bowles (5th Cir.

1980) 625 F.2d 526, 532 [officer in pursuit of suspect who passes him, turns to face him and holds out credentials has restrained the suspect].) A citizen has the right to leave at the approach of police, and when the officer takes action to prevent a citizen's exit, the officer has restrained the citizen's freedom of movement. (People v. Washington, supra, 192 Cal.App.3d 1120, 1125-1126.)

Respondent contends that by its citation of Hester v. United States (1924) 265 U.S. 57 in Brower v. County of Inyo (1989) 489 U.S. ___ [109 S.Ct. 1378], a civil rights case, the Supreme Court has adopted the suggestion of two justices in Chesternut that there can be no detention until a fleeing suspect is actually caught.3/ (Michigan v. Chesternut, supra, 108 S.Ct. 1975,

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3. The language referred to in Chesternut is: "It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1981.) If this statement refers to a requirement of physical restraint, it would be contrary to many years of Supreme Court precedent stating that no physical restraint is necessary to constitute a detention. (Adams v. Williams (1972) 407 U.S. 143, 146 [involuntary rolling down of vehicle window in response to officer's request denoted a "forcible stop"]; Terry v. Ohio (1967)

1081, Kennedy J., concurring, joined by Scalia, J.) We do not find that conclusion is compelled by Brower. In Hester, defendant and an accomplice were under surveillance as a result of an informant's tip. Officers saw the accomplice hand defendant a quart bottle, at which point the court stated: "An alarm was given." (Hester v. United States, supra, 265 U.S. 57, 58.) Defendant grabbed a gallon jug and fled with the accomplice. An officer pursued, and the two men dropped the bottles, which the officers recognized as containing illegal whiskey. It appears from these facts that the officers in Hester had at least a reasonable suspicion, having lawfully witnessed the transaction with the bottles, which would have justified a detention prior to defendant's flight. The case has no application to illegal detentions, nor does it purport to define what constitutes a detention, but merely states that there was no seizure when the officers inspected the bottles.

The Brower court's purpose in citing Hester was to illustrate its statement that the term "seizure" could not be applied to an unknowing act, but must be

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392 U.S. 1, 19, fn. 16 ["[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."].)

the result of government means "intentionally applied." (Brower v. County of Inyo, supra, 109 S.Ct. 1378, 1381.) The court was considering a case in which a fleeing suspect had been killed when his car crashed into a police roadblock. The lower court had concluded that the death was caused by the suspect's voluntary act of failing to stop. The Supreme Court stated that this "decision to continue the chase" could not eliminate the county's responsibility for termination of his movement. (Id., at p. 1380.) The court concluded that use of the roadblock to stop the car was a seizure. We find no application to the instant case, and no requirement of physical restraint prior to a finding that a detention has occurred.[4] We conclude, on the facts of this case, that there was a detention, and that the detention began as soon as appellant saw the officer running toward him.

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4. Even if physical seizure were required, we believe that the facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked "police," who was 11 feet away and running toward him.

Reasonable Cause to Detain

The trial court concluded that the police had no reasonable cause to detain appellant prior to his discard of the drugs. Respondent does not dispute the trial court's finding that the police had no reasonable cause to chase or detain appellant, choosing to rest on the argument that there was no detention. The trial court's decision on this issue is supported by the law.

Initially, we note that the fact of appellant's flight at the sight of the officers is sometimes relevant in assessing the existence of an officer's reasonable suspicion, where, as here, the flight is not triggered by an illegal act on the part of the officer. (3 LaFave, Search and Seizure (2d Ed. 1987) § 9.3(c), p. 449, fn. 150, citing Commonwealth v. Thibeau (1981) 429 N.E.2d 1009.) Flight alone, however, is insufficient to justify a detention. (People v. Aldridge (1984) 35 Cal.3d 473, 478.) "If the right to be free from unjustified detention is lost merely by seeking to avoid such encounters, then the right is meaningless; it would exist only to the extent it was not exercised." (People v. Bower (1979) 24 Cal.3d 638, 649 [fact that appellant, white, observed by police with a group of blacks, started moving hurriedly away raises no inference of criminal activity]; Wong Sun

v. United States (1963) 371 U.S. 471, 482-483 [suspect's flight from narcotics officer at door does not justify otherwise illegal police action].) Flight coupled with other "specific knowledge on the part of the officer relating the suspect to the evidence of crime" may be considered in assessing an officer's actions. (Sibron v. New York (1968) 392 U.S. 40, 66-67.) Thus, the fact that appellant ran away can support a detention only when coupled with other specific knowledge.

The only other factor known to the officers in the instant case at the time was that the address where the red car was parked was an area of high narcotic activity. The hour (10:30 p.m.) was not unusually late; the officers observed no exchange of drugs or money; there was no Vehicle Code violation observed; and the officers did not recognize any of the people standing near the car. The factors of nighttime, high drug activity in the area, and seeking to avoid police were held insufficient to justify a detention in People v. Aldridge, supra, 35 Cal.3d 473, 478. We must conclude that the facts known to the officers in the instant case at the time they began to chase appellant, and when appellant became aware of the effort to stop him, did not constitute "'. . . specific and articulable facts causing

[the officers] to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person [the officers] intend[] to stop or detain is involved in that activity. . . .'" (People v. Aldridge, supra, 35 Cal.3d 473, 478; In re Tony C. (1978) 21 Cal.3d 888, 893.)

Link Between Abandonment of the Cocaine and the Illegality

Finding that appellant was detained without a reasonable suspicion of criminal activity does not end our inquiry. Not all evidence obtained through illegal police action must be excluded. (Wong Sun v. United States, supra, 371 U.S. 471, 487-488.) The test is not whether the evidence would have come to light but for the illegality, but if the evidence was obtained as a direct result, or exploitation of the illegality. If the evidence was obtained by sufficiently independent means, or an intervening independent act of the defendant, the "taint" of illegality is said to have been purged. (Ibid; People v. Lee (1986) 186 Cal.App.3d 743, 751.)

Respondent argues that appellant failed to show a nexus between the police action and the evidence, as there was no showing that the police

intended to search him as opposed to merely detaining him. Respondent disputes our analysis in People v. Menifee, supra, 100 Cal.App.3d 235, and the holding in People v. Washington, supra, 192 Cal.App.3d 1120, and cites two opposing cases as the correct analysis of the nexus requirement. (People v. Patrick (1982) 135 Cal.App.3d 290; People v. Holloway (1985) 176 Cal.App.3d 150.) The latter two cases conclude that absent a police threat of an illegal search, evidence that is abandoned by a fleeing suspect is the product of a voluntary act rather than a product of an illegal detention. We cannot agree that the illegality involved must be a search in order for discovered evidence to be suppressed as a direct result or exploitation of the illegality.

"[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation -- whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the curse of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." (United States v. Crews (1980) 445 U.S. 463, 470, fns. omitted.) Factors to be considered in determining whether evidence is a product

of police illegality include whether the evidence was obtained as a product of the defendant's free will, the temporal proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. (Brown v. Illinois (1975) 422 U.S. 590, 603-604 [considering whether a confession was obtained by exploitation of an illegal arrest].) None of these factors require a showing of an illegal search as the triggering illegality, as opposed to an illegal arrest or detention.

Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing appellant was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than the four Black youths standing near a car. Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. (United States v. Pirolli (11th Cir. 1982) 673 F.2d 1200, 1204

[abandonment that is the product of police misconduct is not voluntary]; United States v. Beck (5th Cir. 1979) 602 F.2d 726, 730 [throwing marijuana out car window not voluntary abandonment after officer had pulled police car in front of defendant's parked vehicle].) To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction.

The purpose of the exclusionary rule to deter illegal police conduct is served by our decision. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases." (4 LaFave, Search and Seizure, op. cit. supra, § 11.4(j), pp. 459-460.) If the police had no legal ground to obstruct appellant's path, exclusion of the evidence obtained as a direct result of that action serves to deter the repetition of such unfounded detentions.

We adhere to the analysis mandated by Wong Sun, Crews, and Brown, and determine that the challenged evidence was obtained as a direct result of the

illegal detention. The trial court erred in ruling that the evidence was admissible in the action below.

The order appealed from is reversed.

CERTIFIED FOR PUBLICATION

Racanelli, P.J.

We concur:

Nesom, J.

Stein, J.

Trial Court: Superior Court, County of Alameda

Trial Judge: Hon. Wilmont Sweeney

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AO43060
In re Hodari D.

FILED December 15, 1989
Court of Appeal - First App. Dist.
Ron D. Barrow, Court Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division One, No. A043060
S013842

IN THE SUPREME COURT OF STATE OF CALIFORNIA

IN BANK

In Re HODARI D., A Person Coming Under the Juvenile Court Law

THE PEOPLE, Respondent

v.

HODARI D., Appellant

Respondent's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed December 15, 1989, which appears at 216 Cal.App.3d 745. (Cal. Const., Art.VI, Section 14; Rule 976, CAl. Rules of Court.)

LUCAS
CHIEF JUSTICE

SUPREME COURT
Filed March 15, 1990
Robert Wandruff, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1990

Re: California v. Hodari D.
No. 89-1632

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.